TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. 21, Original.

THE STATE OF GEORGIA, COMPLAINANT,

vs.

[illegible] OF THE [illegible]

[illegible]

[illegible] RAILWAY COMPANY.

[illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 21, Original.

THE STATE OF GEORGIA, COMPLAINANT,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY AND THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

IN EQUITY.

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1 At the Capitol of the United States in the City of Washington and District of Columbia, being the present seat of the National Government of the United States, on the second Monday of October (being the ninth day of the same month), in the year of our Lord one thousand nine hundred and sixteen and of the Independence of the United States the one hundred and forty-first, the Supreme Court of the United States met agreeably to law.

And thereafter, to wit, on the 6th day of March, A. D. 1917, the following entry appears of record, viz:

2 No. —, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY et al.

The motion for leave to file a bill of complaint in this cause was submitted to the consideration of the Court on printed arguments by Mr. William A. Wimbish in support of the same and Mr. Edward Colston and Mr. George Hoadley in opposition thereto.
March 6, 1917.

Which said motion is in the words and figures following, viz:

3 To the Supreme Court of the United States:

The State of Georgia, one of the sovereign States of the American Union, acting herein by its counsel, William A. Wimbish, thereunto specially authorized under and pursuant to the laws of said State, presents herewith a bill of complaint in the name and behalf of the said State of Georgia against the Trustees of the Cincinnati Southern Railway and against The Cincinnati, New Orleans & Texas Pacific Railway Company, as lessee of said Cincinnati Southern Railway, wherein substantial equitable relief is prayed against said named defendants.

It is further shown unto the Court that the property of the Western & Atlantic Railroad, lying and being in the County of Hamilton, State of Tennessee, is exclusively the property of the State of Georgia, acquired and owned in its sovereign capacity under special authority from the State of Tennessee; and it is further shown that the Western & Atlantic Railroad referred to in said bill of complaint was originally constructed by the State of Georgia out of public funds as a great public work and has since been continuously and exclusively owned by the said State directly in its governmental and sovereign capacity without the intervention of
4 any incorporation or other intermediary; and that the purpose and object of the suit is to protect the said State of

Georgia in its right to the undisturbed use, occupation and enjoyment of its said property.

Wherefore, invoking the exercise of the original jurisdiction of this Court, it is respectfully prayed that leave be granted for the filing of said bill of complaint in the name and behalf of the State of Georgia; and that this Court will issue its appropriate order permitting and directing the filing of said bill.

WILLIAM A. WIMBISH,
Solicitor and Counsel for the State of Georgia.

525 Grant Building, Atlanta, Ga.

Certificate.

I, Nathaniel E. Harris, as Governor of the State of Georgia, do hereby certify that I have read the foregoing application for leave to file the accompanying bill of complaint in behalf of the State of Georgia, invoking the exercise of the original jurisdiction of the Supreme Court of the United States, and that the facts therein stated are true:

5 And I further certify that William A. Wimbish is duly authorized under and pursuant to the laws of the State of Georgia to represent the said State as its solicitor and counsel in the filing and prosecution of said suit; and to this end he is authorized to act for and in the name and behalf of the said State of Georgia.

In witness whereof, I have hereunto set my official signature as Governor of the State of Georgia and have caused to be attached hereto the Great Seal of the State.

Done at the Capitol, in the City of Altanta, State of Georgia, this 15th day of February, A. D. 1917.

NATHANIEL E. HARRIS,
Governor of the State of Georgia.

[Great Seal of State Attached.]

Attest:
PHILIP COOK,
Secretary of State.

6 And afterwards, to wit, on the 12th day of March, A. D. 1917, the following entry appears of record, viz:

No. —, Original.

THE STATE OF GEORGIA, Complainant,
vs.
THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY et al.

On consideration of the motion for leave to file a bill of complaint herein,

It is now here ordered by the Court that the said motion be, and the same is hereby, granted, and that process issue against the defendant returnable on the first day of the next term of this Court.
March 12, 1917.

And, afterwards, to wit, on the 19th day of March, A. D. 1917, an appearance was entered for the complainant as follows, viz:

7 *Order for Appearance.*

Supreme Court of the United States, October Term, 1916.

No. 30, Orig'l.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY et al.

The Clerk will enter my appearance as Counsel for the Complainant.

(Name) WILLIAM A. WIMBISH.

(P. O. Address) 525 Grant Building, Atlanta, Ga.

☞ NOTE.—Must be signed by a member of the Bar of the Supreme Court United States. Individual and not firm names must be signed.

(Endorsed:) Supreme Court, U. S. October Term, 1916. Term No. 30, Original. Appearance for Complainant filed March 19th, 1917.

And on the same day, to wit, the 19th day of March, A. D. 1917, the Bill of Complaint was filed in words figures following viz:

8 In the Supreme Court of the United States, October Term, 1916.

THE STATE OF GEORGIA, Complainant,

against

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY,

and against

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Defendants.

Original Bill.

To the Supreme Court of the United States:

The State of Georgia, one of the sovereign States of the American Union, and one of the original Thirteen American Colonies, acting herein by William A. Wimbish, its solicitor and counsel, thereunto specially authorized, presents this its bill of complaint against
9 Levi C. Goodale, Washington T. Porter, John Weld Peck,
David G. Edwards, and Henry T. Hunt, as Trustees of the Cincinnati Southern Railway, of which Board of Trustees the said Levi C. Goodale is President, and each of whom is a citizen of the State of Ohio, residing in the City of Cincinnati, in said State; and against The Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation organized and existing under the laws of the State of Ohio, as lessee of said Cincinnati Southern Railway; and thereupon it is respectfully represented unto the Court as follows, to-wit:

I.

The City of Cincinnati, under an Act of the General Assembly of the State of Ohio, passed May 4th, 1869, and acts supplementary thereto, and under enabling acts of the General Assemblies of the States of Kentucky and Tennessee, constructed a railway known and designated as the Cincinnati Southern Railway, extending from the City of Cincinnati, in the State of Ohio, to the City of Chattanooga, in the State of Tennessee. The funds employed in the construction of said railway were provided by the City of Cincinnati under the laws of said State of Ohio. Complainant is informed that the said railway so constructed and owned by the City of Cincinnati is not a corporation, the management and control of its
10 affairs being committed to and the legal title to the property
being vested in a Board of Trustees composed of individual members, and that Levi C. Goodale and the other individual persons hereinabove named compose the said Board of Trustees as now constituted.

II.

Defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company, is a corporation organized and existing under the laws of the State of Ohio, and as such a citizen of the State of Ohio, with its domicile and principal office in the City of Cincinnati, in said State.

III.

The Western & Atlantic Railroad is a line of railway extending from the City of Atlanta, in the State of Georgia, to the City of Chattanooga, in the State of Tennessee. The building of this Railroad was initiated by the State of Georgia as a great public work, and it was constructed by the State wholly out of public funds. All of the property appertaining to said Railroad, including its rights of way and terminals, is exclusively owned by the State of Georgia
11 directly and immediately in its governmental and sovereign
capacity. The property, the title to which resides in the State, is a part of the public domain; it has never been incorporated, nor has it any capital stock, nor does it constitute a legal entity.

IV.

In acquiring properties in Tennessee for the construction and use of the Western & Atlantic Railroad, the State of Georgia acted under authority granted directly to it by the State of Tennessee. By direction of a joint resolution of the General Assembly of Georgia approved November 30th, 1837, the Governor despatched a special agent to negotiate in behalf of the State of Georgia with the Legislature of the State of Tennessee for the purpose of obtaining an act authorizing the extension of said road from the Georgia line through the territory of Tennessee to the Tennessee River. As a result of such negotiation the General Assembly of the State of Tennessee passed an Act, approved January 24th, 1838, authorizing the State of Georgia to extend her Western & Atlantic Railroad from the Georgia line to some point on the eastern margin of the Tennessee River. The grant of authority for the construction of said Railroad within Tennessee ran directly to the State of Georgia. Sub-
12 sequent legislation in Tennessee further confirmed the authority so granted to the State of Georgia. The title and right to use the property so acquired in the State of Tennessee became vested in the State of Georgia in its public capacity as a sovereign State, and this construction has been recognized and declared by the courts of Tennessee, which have held that with respect to this property the State of Georgia cannot be sued without its consent, that prescription does not run against it, and that the doctrine of estoppel does not apply.

V.

The said Cincinnati Southern Railway was completed and opened for traffic between Cincinnati and Chattanooga in February, 1880. Under date of the 11th day of October, 1881, the then Board of Trustees of the Cincinnati Southern Railway, pursuant to an Act of the General Assembly of the State of Ohio, entered into and executed a lease of said Cincinnati Southern Railway, together with all its properties and appurtenances, to said The Cincinnati, New Orleans & Texas Pacific Railway Company for a term of twenty-five years next ensuing. Subsequently, and prior to the expiration of the said term,
to-wit, on the 7th day of June, 1902, the term of said lease of
13 said railway to The Cincinnati, New Orleans & Texas Pacific
Railway Company was extended for sixty years following the date of the expiration of the first term, that is to say, until the 12th day of October, 1966. Following and pursuant to said lease of October 11th, 1881, The Cincinnati, New Orleans & Texas Pacific Railway Company entered into possession of the said Cincinnati Southern Railway and its properties and has since continuously maintained such possession and operated the said Railway.

VI.

Prior to the completion of the said Cincinnati Southern Railway, to wit, on the 8th day of October, 1879, the General Assembly of the State of Georgia, upon application of the Trustees of the Cincinnati Southern Railway, passed an Act giving to the said Trustees for the use of the Cincinnati Southern Railway permission to use that portion of the right of way of the Western & Atlantic Railroad between Boyce Station, Tennessee, and Chattanooga, Tennessee, that lies westerly of a line running parallel with and nine and one-half ($9\frac{1}{2}$) feet westerly from the center of the track of the Western & Atlantic
Railroad. For convenience of reference a copy of said Act
14 of the General Assembly of the State of Georgia is hereto
attached, marked "Exhibit A."

VII.

Pursuant to the permission so granted by the said Act of the General Assembly of Georgia, the Trustees of the Cincinnati Southern Railway proceeded to occupy with the tracks, rails and superstructure of said Railway that portion of the right of way of the Western & Atlantic Railroad indicated and referred to in said Act; and further without any authority therefor the said Trustees of the Cincinnati Southern Railway and their said lessee, The Cincinnati, New Orleans & Texas Pacific Railway Company, have occupied and used, and continue to occupy and use a greater portion of said right of way than was contemplated and permitted in said Act. That portion of said right of way used and occupied by The Cincinnati, New Orleans & Texas Pacific Railway Company, as lessee of the Cincinnati Southern Railway, became and is described as follows, to-wit:

That portion of the right of way of the Western & Atlantic Railroad between Boyce Station and Chattanooga in Hamilton
15 County, Tennessee, that lies westerly of a line running parallel with and seven (7) feet westerly from the center of the track of the Western & Atlantic Railroad, and being particularly described as follows:

A strip of ground extending from a point at Boyce Station ,at mile post one hundred and thirty-two (132) from Atlanta plus four hundred eighty (480) feet in the direction of Chattanooga, and thence for a distance of nineteen thousand five hundred and thirty-seven (19,537) feet, it being continuously twenty-six (26) feet wide, except at the beginning and ending points.

Also that portion of the right of way of Western & Atlantic Railroad between Boyce Station and Chattanooga in Hamilton County, Tennessee, lying easterly of a line running parallel with and seven (7) feet from the center of the track of the Western & Atlantic Railroad, being more particularly described as follows:

Beginning at a point near Magnolia Street in the City of Chattanooga and extending to about Gas Street in said City, for a distance of seventeen hundred fifty (1750) feet, said strip being twen-
16 ty-six (26) feet wide, except at beginning and ending points, where it enters and leaves the said right of way of the said Western & Atlantic Railroad.

Complainant attaches hereto marked "Exhibit B," a map or plat of said right of way of the Western & Atlantic Railroad between Boyce Station and Chattanooga, Tennessee, showing that portion of the right of way the use of which was permitted by the State of Georgia, including the further encroachment on the property by the defendants hereto for which no sanction or permission was given by or under authority of the State.

VIII.

It is further shown unto the Court that at the time of the passage of said Act granting permissive use of the property of the State to the Trustees of the Cincinnati Southern Railway there was no then existing need for the use of all of said right of way for the convenient use and operation of the Western & Atlantic Railroad. The construction of the Cincinnati Southern Railway was then nearing completion, and entrance into the City of Chattanooga was desired by it. In these circumstances the General Assembly of Georgia gave
17 to the Trustees of the Cincinnati Southern Railway permission and license to use that part of the right of way of the Western & Atlantic Railroad defined in said Act of October 8th, 1879, upon the representation that the Cincinnati Southern Railway would form a most important feeder, and become practically an extension of the Western & Atlantic Railroad, which was the property of the State, and give to the commerce of the State the advantage of

a direct and admirable connection with the railway system of the North and West.

Shortly thereafter, as hereinabove shown, The Cincinnati, New Orleans & Texas Pacific Railway Company became the lessee of the Cincinnati Southern Railway, and as such lessee entered upon and has continued in the use and enjoyment of that portion of the right of way of the Western & Atlantic Railroad hereinabove described, without the payment of any rental or other consideration therefor. Thereafter the control, management and operation of The Cincinnati, New Orleans & Texas Pacific Railway Company became such as to defeat and render nugatory the representations made to the State that the Cincinnati Southern Railway would become an important feeder and a practical extension of the Western & Atlantic Railroad, for that the said The Cincinnati, New Orleans & Texas
18 Pacific Railway Company, in connection with its affiliated line, the Southern Railway Company, had become an active, strong and aggressive competitor with the Western & Atlantic Railroad for the traffic moving between Cincinnati and Atlanta. The State of Georgia was thus deprived of the benefit it reasonably anticipated would flow to it from the representations made at the time the permissive use of its property was granted.

It further transpired that the need of the Western & Atlantic Railroad for the use of all of its right of way between Boyce Station and Chattanooga, Tennessee, became urgent and imperative in order to adequately accommodate the safe and expeditious handling of traffic in the public interest. The growth of traffic demanded that the portion of the right of way occupied by The Cincinnati, New Orleans & Texas Pacific Railway should be used for an extension of the Chattanooga terminal system of the Western & Atlantic Railroad in order to avoid danger and delay in the operation of trains.

Influenced by these considerations the General Assembly of Georgia by an Act approved August 21st, 1916, repealed the said Act of October 8th, 1879, thereby withdrawing and revoking the license and permission to use the State's property as given in said
19 last mentioned Act. A copy of this Act of August 21st, 1916, is hereto attached as "Exhibit C" for convenience of reference.

IX.

The said Act of August 21st, 1916, extended to the Trustees of the Cincinnati Southern Railway, and their lessee, The Cincinnati, New Orleans & Texas Pacific Railway Company, an opportunity to come to an agreement with the Western & Atlantic Railroad Commission for the continued use and occupation of said right of way of the Western & Atlantic Railroad for such period of time as might be reasonably necessary to readjust and construct their line of railway between Boyce Station and Chattanooga on property other than that of the State; and within that time to have the privilege of removing from the said right of way of the Western & Atlantic Railroad all of their tracks, rails, ties, superstructure and other railway appurtenances owned and used by them and placed upon said right of way under the terms of said Act of October 8th, 1879.

The defendants declined to avail themselves of the opportunity and privilege thus afforded, and under date of September 18th, 20 1916, the Trustees of the Cincinnati Southern Railway, for themselves and on behalf of their lessee, The Cincinnati, New Orleans & Texas Pacific Railway Company, presented to and filed with the Governor of the State of Georgia and the Western & Atlantic Railroad Commission their formal declaration in writing, refusing to recognize and accept the provisions of said Act of August 21st, 1916, and avowing that their possession of said right of way then and thereafter is referable to said grant of October 8th, 1879, and their subsequent possession, user, and improvement thereof and expenditures thereon, was with the knowledge and acquiesence, and to the estoppel of the State of Georgia to dispute the same. A copy of said declaration is hereunto attached, marked "Exhibit D."

X.

It is further respectfully shown unto the Court that the license granted to the Trustees of the Cincinnati Southern Railway for the limited use and occupation of the State's property having been revoked, the further use and occupation of said property, or any part thereof, by said Trustees or their lessee, is unlawful and the operation of trains thereover by the Cincinnati, New Orleans & Texas Pacific Railway Company without authority therefor consti-21 tutes a continuing trespass and a constantly recurring grievance, occasioning irreparable injury to the complainant, incapable of pecuniary estimation, and for the redress of which there is no adequate remedy at law.

XI.

Complainant shows that the said Trustees of the Cincinnati Southern Railway own and possess for the use of said Railway and its lessee a right of way immediately adjacent to and parallel with the right of way of the Western & Atlantic Railroad from Boyce Station to Chattanooga, Tennessee, fully adequate in location, character and extent to accommodate all of the needs of the defendants for the convenient operation of their Railway and the conduct of their business between said Boyce Station and Chattanooga.

The right of way of the Western & Atlantic Railroad between said points has a maximum width of only sixty-six (66) feet, while the adjacent and parallel right of way of the Cincinnati Southern Railway has a width varying from a minimum of eighty-five (85) feet to a maximum width of one hundred and sixty-five (165) feet, the width for much of the distance being one hundred and fifty-five (155) feet.

22 The encroachment of the Cincinnati Southern Railway upon the right of way of the Western & Atlantic Railroad is

of a uniform width of twenty-six (26) feet for a distance of about nineteen thousand five hundred (19,500) feet, so that the Western & Atlantic Railroad is left for its own use only forty (40) feet of its right of way for a distance of more than three and one-half (3½) miles at and approaching its terminal system at Chattanooga. Complaint shows that this narrow strip is utterly inadequate to the demands of the Western & Atlantic Railroad for the safe and expeditious operation of its trains and the handling of its traffic; that the serious restriction of its right of way produces great congestion, retards the convenient operation of its trains, and imposes an unjust and gr*evi*ous burden upon its traffic. As above shown the Cincinnati Southern Railway is no longer dependent upon or requires the use of the right of way of the Western & Atlantic Railroad in order to afford it convenient and adequate entrance into the City of Chattanooga, as was the case at the time the State gave permission to use its right of way for that purpose. Hence it is that a discontinuance of the unlawful use and occupation by the defendants of the right of way of the Western & Atlantic Railroad would work them no injustice and impose no hardship upon them, nor in any way impair their ability to adequately and efficiently serve the
23 public as a common carrier.

XII.

The complainant seeking equity offers to do equity, and hereby consents that the defendants may within such reasonable time as may be limited by the Court remove from the said right of way of the Western & Atlantic Railroad such of their tracks, rails, ties, and other superstructure as can be done without undue delay and without injury to the freehold, thereby extending to the defendants that grace of which they might have availed themselves under the provisions of the Act of the General Assembly of Georgia of August 21st, 1916.

Wherefore, The complainant, invoking the exercise by this Court of its original jurisdiction in equity, respectfully prays as follows, towit:

First. That the defendants named, and each of them, their representatives, servants, and agents, severally and collectively, be perpetually enjoined from the operation of trains over and upon the said right of way of the Western & Atlantic Railroad between Boyce Station and Chattanooga, Tennessee, or any part thereof; and
24 from entry upon or the commission of any act of trespass on said right of way incident to or in connection with the operation of trains, and the conduct of the business of transportation; and from in any wise disturbing or interfering with the possession, and the free and unrestricted use of its right of way by, in behalf of, or under authority of the complainant, the State of Georgia.

Second. That the injunction herein prayed be granted upon such terms as may appear to the Court to be just and equitable as between the parties; and to this end that the defendants be permitted within such reasonable time as may be limited by the Court, to remove from said right of way of the Western & Atlantic Railroad their tracks, rails, ties and superstructure to the extent that it may be done without undue delay, and without injury to the freehold.

Third. That the complainant may have such other, further and general relief as the facts of the case may warrant, and the Court shall deem consonant with the principles of equity and good conscience.

Fourth. That process may issue directed to the defendants, Levi C. Goodale, as President, and Washington T. Porter, John Weld Peck, David G. Edwards, and Henry T. Hunt, as members of the Board of Trustees of the Cincinnati Southern Railway, whose address is 57-58 Ingalls Building, Cincinnati, Ohio, and to The Cincinnati, New Orleans & Texas Pacific Railway Company, whose address is Cincinnati, Ohio, commanding them and each of them, to be and appear before this Court within such time as may be limited by the Court to answer this complaint and abide the further order and decree of the Court: 25

And that the Court will from time to time enter herein such special orders and decrees, and issue such writs as may be deemed appropriate in the progress of the cause, to the end that complete justice between the parties may be administered, and the rights of the complainant in the premises be established and enforced.

THE STATE OF GEORGIA,
By WILLIAM A. WIMBISH,
Its Solicitor and Counsel.

525 Grant Building, Atlanta, Georgia.

26 STATE OF GEORGIA,
Fulton County:

In person appeared before the undersigned, William A. Wimbish, who being duly sworn deposes and says that he is solicitor and counsel for the State of Georgia specially authorized to file and prosecute the foregoing bill of complaint; that he has read and is familiar with the contents of the foregoing bill, and that the allegations therein contained are true to the best of his information, knowledge and belief.

WILLIAM A. WIMBISH.

Sworn to and subscribed before me this February 16th, 1917.

JAS. D. RHODES, [SEAL.]
Notary Public, Fulton County, Georgia.

27 "EXHIBIT A."

An Act granting right of way to the Cincinnati Southern Railway, where its route adjoins that of the Western and Atlantic Railroad.

Section 1. Be it enacted by the General Assembly of the State of Georgia, That whereas the city of Cincinnati has nearly completed the Cincinnati Southern Railway, a grand trunk line which will be of great benefit to the State of Georgia forming a most important feeder and practically an extension of the Western and Atlantic Railroad, which is the property of the State, and giving to our commerce the advantage of a direct and admirable connection with the railway system of the North and West.

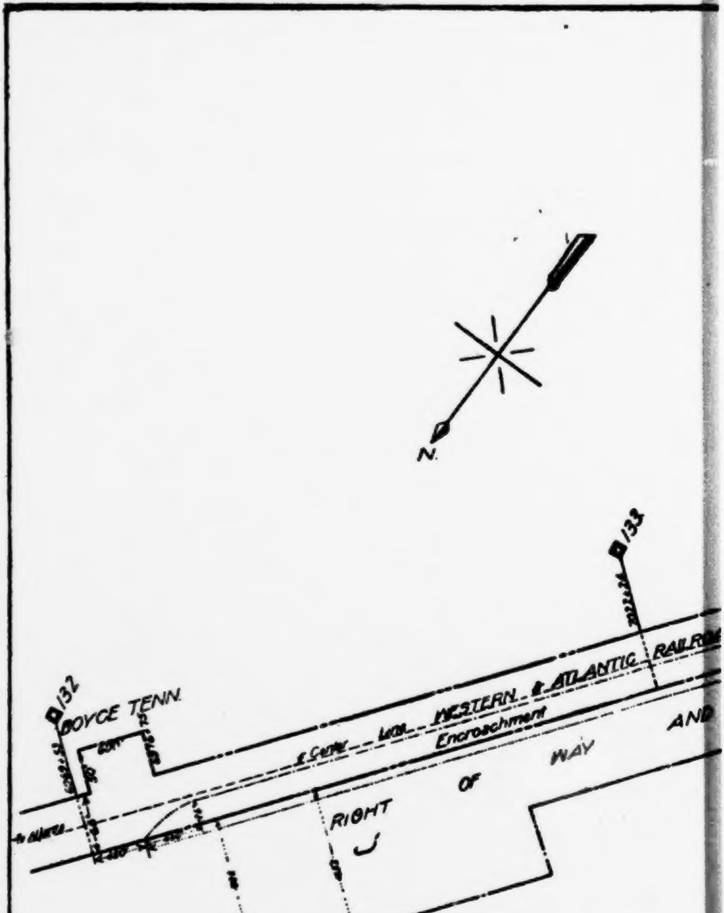
And Whereas, said railway reaches the Western and Atlantic Railroad at Boyce's Station, and for the most of the distance to the termini of the two railroads in Chattanooga, their routes run parallel to and adjoining each other, a distance of about five miles.

And Whereas, it is to the advantage of both railroads to be able to locate their tracks and works close together, thus saving expense to one in construction, and to both in maintaining the road-bed and facilitating railroad operations; and giving to both railroads the advantage of a stronger and firmer road-bed through a route subject to overflow by floods in the Tennessee River; there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway the use of that portion of the right of way of the Western and Atlantic Railroad between Boyce's Station, Tennessee, and
the Chattanooga, Tennessee, terminus that lies westerly of a
28 line running parallel with, and nine and a half feet westerly
from the center of the track of the Western and Atlantic
Railroad, so as to admit of laying track, if desired, near enough to the track of the Western and Atlantic Railroad to leave the distance between the centers of tracks fourteen feet, and between the nearest rails of the two railroads nine feet; Provided always, that this grant is subject to the consent and approval of the lessees of the Western and Atlantic Railroad as to the term of their lease; Provided further, that the grade adopted by the said Cincinnati Southern Railroad along and over the aforegranted right-of-way shall always be the same as that of the Western and Atlantic Railroad.

Sec. 2. Be it further enacted, That all Acts and parts of Acts inconsistent with this Act are hereby repealed.

Approved October 8th, 1879.

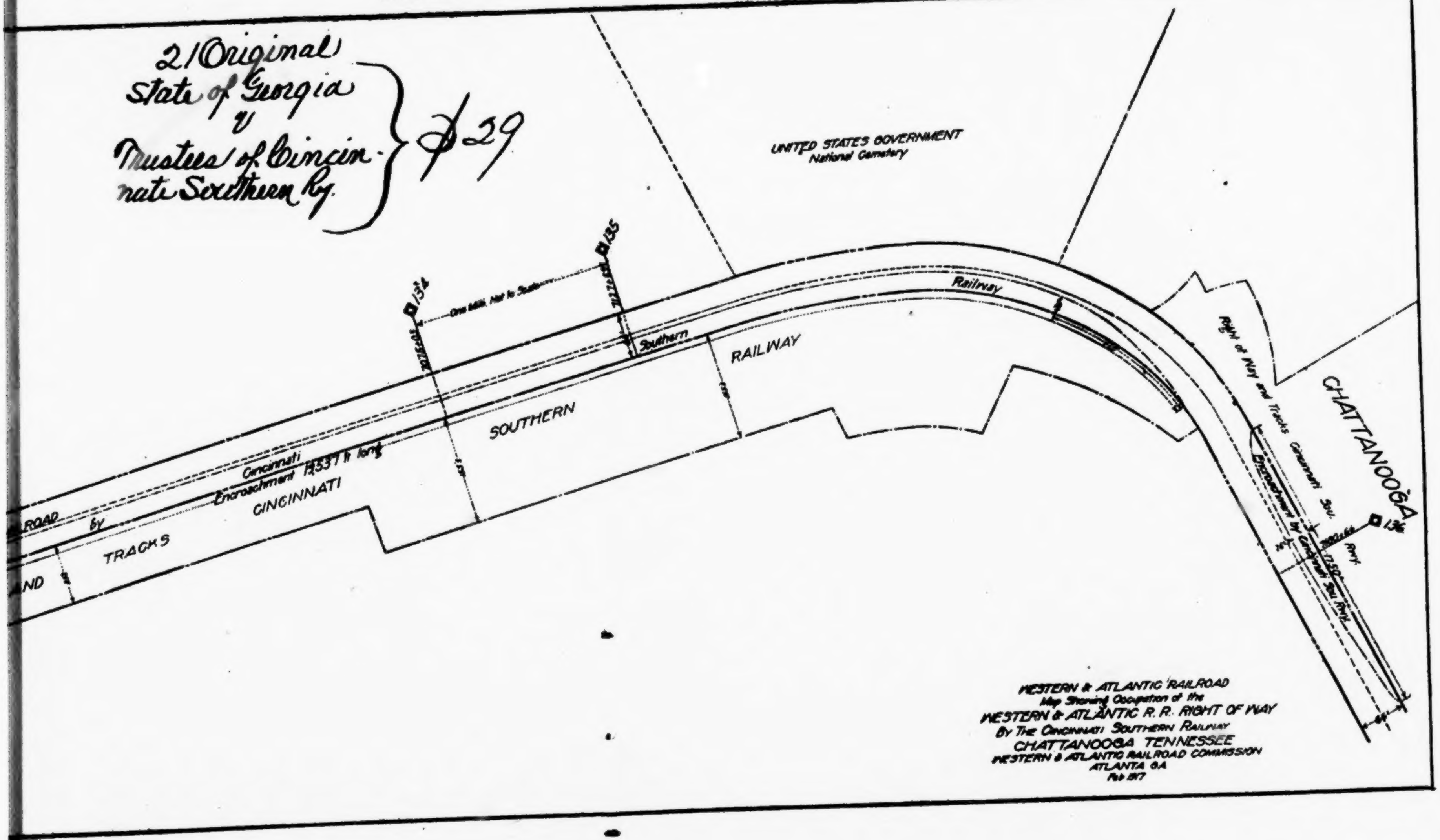
(Here follows map marked p. 29.)


N.
132
BOYCE TENN.
133
WESTERN & ATLANTIC RAILRO
℄ Center Line
Encroachment
To Atlanta
RIGHT OF WAY AND

"EXHIBIT B."

21 Original
State of Georgia
v
Trustees of Cincinnati Southern Ry.

$29


UNITED STATES GOVERNMENT
National Cemetery
134
135
136
One Mile, Not to Scale
Southern
Railway
RAILWAY
SOUTHERN
ROAD
by
Cincinnati
Encroachment 13537 ft long
CINCINNATI
TRACKS
ND
Right of Way and Tracks Cincinnati Sou. Rwy.
Encroachment by Cincinnati Sou Rwy.
CHATTANOOGA

WESTERN & ATLANTIC RAILROAD
Map Showing Occupation of the
WESTERN & ATLANTIC R. R. RIGHT OF WAY
By The Cincinnati Southern Railway
CHATTANOOGA TENNESSEE
WESTERN & ATLANTIC RAILROAD COMMISSION
ATLANTA GA
Feb 1917

30

"Exhibit C."

An Act to repeal an Act of the General Assembly of Georgia, approved October 8, 1879, entitled an Act granting right of way to the Cincinnati Southern Railway, where its route adjoins that of the Western and Atlantic Railroad, and for other purposes.

Whereas, the General Assembly of Georgia did, in an Act approved October 8, 1879, grant to the trustees of the Cincinnati Southern Railway, for the use of said railway the use of that portion of the right of way of the Western and Atlantic Railroad between Boyce's Station, Tennessee, and the Chattanooga, Tennessee, terminus that lies westerly of a line running parallel with, and nine and half feet westerly from the center of the track of the Western and Atlantic Railroad; and

Whereas, the said use was permissive only and at the pleasure of the State of Georgia, and was granted to the trustees of said Cincinnati Southern Railway and to the said Cincinnati Southern Railway only; and

Whereas, the consideration moving the State to the grant of use of its property, as expressly recited in said Act, was that the said Cincinnati Southern Railway when completed would be a grand trunk line of great benefit to the State of Georgia, "forming a most important feeder, and practically an extension of the Western and Atlantic Railroad, which is the property of the State," etc.; and

Whereas, the said Cincinnati Southern Railway is no longer operated by the city of Cincinnati, or the trustees of the same, to whom the grant was made or their successors in trust, but has been
31 leased for a long term of years to and is operated by a corporation known — the The Cincinnati, New Orleans and Texas Pacific Railway Company, which lessee company is owned or controlled by railway interests competitive with the Western and Atlantic Railroad; and

Whereas, said Cincinnati Southern Railway, leased and operated as stated above, is not an important feeder and practically an extension of the Western and Atlantic Railroad, but is a direct, important and aggressive competitor with it for traffic moving between the south and west; and

Whereas, the portion of the right of way of the Western and Atlantic Railroad between Boyce and Chattanooga is now or will be practically a part of the Chattanooga terminal system of the said road, and the need of the road for additional tracks on this part of its right of way is urgent and necessary for the expeditious handling of its traffic in the public interest; and

Whereas, The Cincinnati, New Orleans and Texas Pacific Railway operating the Cincinnati Southern Railway is reputed to own ample right of way and property adjoining the right of way of the Western and Atlantic Railroad for a large part or all of the distance between Boyce and Chattanooga, upon which its tracks could be easily and without great expense shifted and operated without materially affecting its entrance into the City of Chattanooga; therefore:

Section 1. It is hereby enacted by the General Assembly of Georgia, That the Act of the General Assembly, approved October 8, 1879, entitled an Act granting right of way to the Cincinnati Southern Railway where its route adjoins that of the Western and Atlantic Railroad be and the same is hereby repealed.

32 Sec. 2. Be it further enacted, That the Cincinnati Southern Railway, and its lessee, the Cincinnati, New Orleans and Texas Pacific Railway Company, shall be permitted to continue the present use and occupancy of the above-mentioned part of the right of way of the Western and Atlantic Railroad, for such period of time as may be agreed on with the Western and Atlantic Railroad Commission, as reasonably necessary for them to readjust and construct their line of railway between Boyce Station and Chattanooga on property other than that of the Western and Atlantic Railroad; provided, however, that such further continued use and occupancy shall be subject to all of the rights of the present lessee of the Western and Atlante Railroad during the term of their present lease under the lease Act of 1889. The said Cincinnati Southern Railway and its lessee, The Cincinnati, New Orleans & Texas Pacific Railway Company, shall have the right to remove from the said right of way of the Western and Atlantic Railroad, prior to or upon the expiration of such time as may be agreed upon with the Western and Atlantic Railroad Commission, all of their tracks, rails, ties, superstructure and other railway appurtenances owned and used by them and placed upon said right of way under the terms of said Act of October 8, 1879.

Sec. 3. Be it further enacted, That all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Approved August 21, 1916.

33 "Exhibit D."

Cincinnati Southern Railway,
57-58 Ingalls Building.

Cincinnati, Sept. 18, 1916.

To the State of Georgia, the Hon. N. E. Harris, Governor of the State, and The Western & Atlantic Railroad Commission, addressed:

It having been publicly announced that His Excellency, the Governor of the State of Georgia, has approved the Act lately passed by the Legislature of Georgia, purporting to repeal the Act passed by the Legislature of Georgia and approved October 8, 1879, entitled, "An Act granting the right of way to the Cincinnati Southern Railway, where its route adjoins that of the Western & Atlantic Railroad and for other purposes", and wherein said repealing Act the said the Cincinnati Southern and its lessee, The Cincinnati, New Orleans and Texas Pacific Railway Company, are apparently granted permission "to continue the present use and occupancy of the said part of the right of way of the Western & Atlantic Railway for such period of time as may be agreed on with the Western & Atlantic Railroad Commission, as reasonably necessary for them to readjust and construct their line of railway between Boyce Station and Chattanooga on property other than that of the Western & Atlantic Railroad."

The Trustees of the Cincinnati Southern Railway for themselves and for and on behalf of their lessee, The Cincinnati, New Orleans and Texas Pacific Railway Company respectfully notify the 34 State of Georgia, through its Governor and the said Western & Atlantic Railroad Commission, that the right of the Trustees of the Cincinnati Southern Railway and of its said lessee to use and occupy the said right of way between Boyce's Station and Chattanooga is under and by virtue of the statutory grant made by the State of Georgia by the passage of the Act of the General Assembly of the State aforesaid, passed and approved October 8, 1879, same being a perpetual grant of said right of way to said Trustees, and that the same was not and is not subject to derogation or repeal by the State of Georgia, and these Trustees further assert that the said attempted repeal of said grant by the recent Act of August 19th, 1916, is ineffectual to revoke the right of these Trustees, or to repeal the said grant of October 8th, 1879.

And these Trustees do hereby disavow holding said right of way under the alleged permission contained in Section 2 of the said repealing Act of August 19th, 1916, and avow their possession of said right of way now and hereafter is not to be referred thereto, but is to be referable to the said grant of October 8, 1879, and their subsequent possession, user and improvement thereof and expenditures thereon with the knowledge and acquiescence and to the estoppel of the State of Georgia and its lessee to dispute the same.

THE TRUSTEES OF THE CINCINNATI
SOUTHERN RAILWAY,
(Signed) By LEVI W. GOODALE, *President*.

Office Supreme Court, U. S. Filed Mar. 19, 1917. James D. Maher, Clerk.

35 And afterwards, towit, on the 27th day of April, A. D. 1917, the Subpœna & Marshal's return were filed in words & figures following, viz:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Trustees of the Cincinnati Southern Railway and The Cincinnati, New Orleans & Texas Pacific Railway Company, Greeting:

For certain causes offered before the Supreme Court of the United States, having jurisdiction in Equity, you are hereby commanded that laying all other matters aside and notwithstanding any excuse, you be and appear before the said Supreme Court, holding jurisdiction in Equity, on Monday, October 1st, 1917, at the City of Wash-

ington, in the District of Columbia, being the Seat of the National Government of the United States, to answer unto a bill of complaint of The State of Georgia in the said Court exhibited against you.
Hereof you are not to fail at your peril.

Witness the Honorable Edward D. White, Chief Justice of the United States, at the City of Washington, the 30th day of March, A. D. 1917.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

36 Service of the foregoing subpœna and a certified copy of the Bill of Complaint therein mentioned are this 18th day of April, A. D. 1917, accepted and acknowledged.

LEVI S. GOODALE,
WASHINGTON C. PORTER,
JOHN W. PECK,
DAVID G. EDWARDS,
HENRY T. HUNT,
The Trustees of the Cincinnati Southern Railway.

Service of the foregoing subpœna and a certified copy of the Bill of Complaint therein mentioned are this 25 day of April, A. D. 1917, accepted and acknowledged.

THE CINCINNATI, NEW ORLEANS & TEXAS
PACIFIC RAILWAY COMPANY,
By EDWARD COLSTON,
General Counsel.

Office of the Marshal, Supreme Court U. S.

Came to my hand the 30th day of March, 1917, and executed through acceptances of service in writing hereon by the defendants, Levi C. Goodale, Washington T. Porter, John W. Peck, David G. Edwards and Henry T. Hunt, The Trustees of the Cincinnati Southern Railway, of the 18th day of April, 1917, and by the defendant the Cincinnati, New Orleans & Texas Pacific Railway Company by Edward Colston, its General Counsel, on the 25th day of April, 1917.

Witness *me* hand this 27th day of April, 1917, at the City of Washington.

FRANK K. GREEN,
Marshal, Supreme Court, U. S.

37 Endorsed: Supreme Court U. S. October Term, 1916. Term No. 30, Original. The State of Georgia, Complainant, vs. The Trustees of the Cincinnati Southern Railway et al. Subpœna, and Marshal's return as to service. Filed April 27th, 1917.

And afterwards, towit, on the 29th day of September, A. D. 1917, an appearance was entered for defendants as follows, viz:

38 *Order for Appearance.*

Supreme Court of the United States.

No. 23, Orig'l, October Term, 1917.

THE STATE OF GEORGIA, Complainant,
vs.
TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY & THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

The Clerk will enter our appearance as Counsel for the defendants.
(Name) EDWARD COLSTON.

(P. O. Address) Cincinnati.

(Name) MICHAEL M. ALLISON.

(P. O. Address) Chattanooga.

☞NOTE.—Must be signed by a member of the Bar of the Supreme Court United States. Individual and not firm names must be signed.

(Endorsed:) Supreme Court U. S. October Term, 1917. Term No. 23, Orgl. Appearance for defendants. Filed Sept. 29, 1917.

39 And afterwards, towit, on the 1st day of October, A. D. 1917, the Answer was filed in words & figures following, viz:

Supreme Court of the United States, October Term, 1916.

No. 30, Original.

THE STATE OF GEORGIA, Complainant,
against
THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Joint and Several Answer of Levi C. Goodale, Washington C. Porter, John Weld Peck, David G. Edwards and Henry T. Hunt, as Trustees of the Cincinnati Southern Railway, and of The Cincinnati, New Orleans & Texas Pacific Railway Company, a Corporation Incorporated by and Existing under the Laws of the State of Ohio, as Lessee of the Cincinnati Southern Railway, to the Bill of Complaint of the State of Georgia.

These defendants, now and at all times hereinafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

40 I.

That the individual defendants named are, and each of them is, a citizen of the State of Ohio residing in the City of Cincinnati in said State, and that it is true, as alleged in paragraph I of the bill of complaint, that the City of Cincinnati, under an act of the General Assembly of the state of Ohio, passed May 4, 1869 (an Act entitled "An Act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants," 66 Ohio Laws, p. 80), and acts supplementary thereto, and under certain acts of the General Assemblies of the States of Kentucky and Tennesseee, constructed a railway known and designated as the Cincinnati Southern Railway, extending from the City of Cincinnati in the State of Ohio to the City of Chattanooga in the State of Tennessee, and that the funds employed in the construction of said railway were provided by the City of Cincinnati under the laws of the State of Ohio. That it is true, as alleged in said bill, that said railway, so constructed and owned by the City of Cincinnati, is not a corporation, but that the legal title thereto is vested in a Board of Trustees, which now is, and at the commencement of this suit was, composed of the individual defendants named herein, and that they, as such trustees, have the management and control, but not the operation, of said Cincinnati Southern Railway.

II.

Defendants say it is true that the corporate defendant is a corporation incorporated and organized under the laws of the State of Ohio, and is a citizen of said State, having its domicile and principal office in the City of Cincinnati. 41

III.

These defendants say that they admit that the Western & Atlantic Railroad is a line of railway extending from the City of Atlanta, in the State of Georgia, to the City of Chattanooga, in the State of Tennessee, as averred in paragraph III of the bill of complaint, and that said railroad was constructed by said State of Georgia, and that all the property appertaining to said railroad, including its rights of way and terminals, is exclusively owned by the State of Georgia, and that the title to the same is in said State, and that said Western & Atlantic Railroad has never been incorporated and has no capital stock or legal entity. But these defendants say that it is not true, as averred in said paragraph of said bill of complaint, that said Western & Atlantic Railroad is owned by said State in its governmental and sovereign capacity or that it is part of the public domain. On the contrary, these defendants allege and aver that the said State's ownership of said railroad is a business adventure, and is in no sense an institution for the exercise of governmental function; all of which has been repeatedly decided and determined by the Supreme Court of the State of Georgia in several cases, one of which is that of Western & Atlantic Railroad v. Carlton, 28 Ga., 180, where the court held that:

"When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulations with persons engaged in the same calling."

42 Another such case is that of W. J. Morrison et al. v. Philip Cook, decided by the Supreme Court of Georgia at the March Term, A. D. 1916, at Atlanta; and the Supreme Court of the State of Tennessee has decided the same thing with reference to Georgia's ownership of said railroad in Tennessee.

IV.

These defendants say that it is true that on January 24, 1838, the State of Tennessee passed the act mentioned in paragraph IV of complainant's bill, authorizing the State of Georgia to extend her Western & Atlantic Railroad from the Georgia line to some point on the eastern margin of the Tennessee river, which act is found in Acts of Tennessee 1837-8, Chap. 221, p. 319, and that there was subsequent legislation by the State of Tennessee conferring additional powers on the State of Georgia in reference to the Western & Atlantic Railroad, enacted February 3, 1848, such subsequent legislation being found in Chapter 195 of the Acts of Tennessee, 1847-8. These defendants say that by said act of 1838 the powers, rights and immunities conferred by the State of Tennessee upon the State of Georgia in reference to the Western & Atlantic Railroad were those that had been conferred by the State of Tennessee upon the Hiwassee Railroad Company, which powers, rights and immunities to the State of Georgia were granted subject to the same restrictions as far as they were applicable, that had been imposed upon said Hiwassee Railroad Company; and that the additional powers conferred by said act of 1848 were "all the rights, privileges and immunities with the same restrictions that had been given and granted by the State of Tennessee to the Nashville & Chattanooga Railroad Company." 43 That these powers, rights and immunities were all the powers, rights and immunities that were ever granted by the State of Tennessee to the State of Georgia in respect of said Western & Atlantic Railroad in Tennessee. These defendants say that the privileges, rights, immunities and restrictions of the Hiwassee Railroad Company are found in the Acts of the Tennessee Legislature (Local) of 1835-6, p. 23. Said act is too long to be set out herein at length, but it confers upon the Hiwassee Railroad Company the power to sue and be sued, plead and be impleaded, and invests that company with the power of eminent domain for the acquisition not only of lands necessary for the location of its railroad but of adjacent lands needed for securing timber, stone, gravel and earth to build and keep said road in repair, and reserves to other railroad

corporations the right to connect their railroad with said Hiwassee Railroad. The rights, privileges, immunities and restrictions conferred upon the Nashville & Chattanooga Railroad are found in Chapter I of the Acts of Tennessee, 1845-6. These powers consisted of the right to receive by gift or purchase, and to hold, sell and convey, real and personal estate, make contracts, sue and be sued, and to do all lawful acts properly incident to a railroad corporation and necessary and proper for the transaction of the business of operating a railroad, and conferred upon it the right of eminent domain, and conferred upon the courts of Tennessee jurisdiction to hear and determine all matters of controversy between that corporation and other parties. These defendants say that under and by virtue of the provisions of the said two acts of the General Assembly of the State of Tennessee, to-wit: the acts of 1838 and 1848, and the acceptance of the same by the State of Georgia, it became amenable to the
44 law of Tennessee to the same extent as did the Hiwassee Railroad Company and the Nashville & Chattanooga Railroad in respect of their several properties. That said acts of 1838 and 1848, respectively, are as follows:

(*Act of January* 24, 1838.)

"Chapter CCXXI.

"An act to authorize the State of Georgia to extend her Western and Atlantic Railroad from the Georgia line to some point on the eastern margin of the Tennessee river.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the State of Georgia shall be allowed the privilege of making every necessary recognisance and survey for the purpose of ascertaining the most eligible route for the extension of her Western and Atlantic Railroad, from the Georgia line to some point on the eastern margin of the Tennessee river.

"Sec. 2. And be it further enacted, That as soon as said route and point shall be ascertained, the State of Georgia shall be allowed the right of way for the extension and construction of her said railroad from the Georgia line to the Tennessee river, and that she shall be entitled to all privileges, rights and immunities (except the subscription on the part of Tennessee) and be subject to the same restrictions as far as they are applicable as are granted, made and prescribed for the benefit, government and direction of the Hiwassee railroad company.

"Sec. 3. And be it further enacted, That the foregoing rights and privileges are conferred upon the State of Georgia on condition that whenever application is made, she will grant and concede
45 similar ones and to as great an extent, to the State of Tennessee, or her incorporated companies.

"JOHN COCKE,
"*Speaker of the House of Representatives.*
"TERRY H. CAHAL,
"*Speaker of the Senate.*"

(*Act of February* 3, 1848.)

"Chapter CXCV.

"An act conferring upon the State of Georgia additional rights in relation to the Western and Atlantic Railroad.

"Be it enacted by the General Assembly of the State of Tennessee, That all the rights, privileges and immunities, with the same restrictions which are given and granted to the Nashville and Chattanooga Rail Road Company by the act of the General Assembly of this State, incorporating said company, passed December 11, 1845, are, so far as they are applicable, hereby given to and conferred upon the State of Georgia, to be enjoyed and exercised by that State in the construction of that part of the Western and Atlantic Rail Road, lying in Hamilton County, Tennessee, and in the management of its business.

"F. BUCHANAN,
"*Speaker of the House of Representatives.*
"J. M. ANDERSON,
"*Speaker of the Senate.*

"Passed February 3, 1848."

These defendants say that the Supreme Court of Tennessee decided in the case of Western & Atlantic Railroad Co. v. Taylor, 6 Heiskel, 408, that the State of Georgia, in so far as its ownership of the Western & Atlantic Railroad is concerned, had divested itself of its 46 sovereign capacity and taken that of a private citizen, and had waived its immunity from suit in Tennessee in respect of the affairs of said Western & Atlantic Railroad. And the same was decided by the Chancery Court of Appeals of Tennessee in East Tennessee, Virginia & Georgia R. R. Co. v. Nashville, Chattanooga & St. Louis R. R. Co., 51 S. W. Rep., 202. This opinion of the Chancery Court of Appeals was affirmed by the Supreme Court of Tennessee, October 26, 1898.

And so these defendants, while admitting that the title and right to use the Western & Atlantic Railroad property acquired in the State of Tennessee became vested in the State of Georgia, deny that it became so vested in said state as a sovereign, and deny that the courts of the State of Tennessee have recognized that to be the case, and deny that the courts of Tennessee have held with respect to said property that the State of Georgia can not be sued without further consent than it has already given by its acceptance of the provisions and restrictions of said Acts of 1838 and 1848, and deny that said courts of Tennessee have held with respect to said property that prescription does not run against the State of Georgia, and deny that the courts of Tennessee have decided with respect to said property that the doctrine of estoppel does not apply to the State of Georgia. These defendants aver that both prescription and estoppel do apply to said state.

V.

These defendants admit that the Cincinnati Southern Railway was completed and opened for traffic between Cincinnati and 47 Chattanooga about February, 1880, and also that on October 11, 1881, the then Board of Trustees of the Cincinnati Southern Railway, pursuant to an act of the General Assembly of the State of Ohio, executed a lease of said railway and all its property and appurtenances to the defendant, The Cincinnati, New Orleans & Texas Pacific Railway Company, for a term of twenty-five years then next ensuing, and that subsequent and prior to the expiration of that term, to-wit, on June 7, 1902, the term of that lease was so extended that it will expire October 11, 1966. These defendants admit that following and pursuant to said lease of October 11, 1881, said The Cincinnati, New Orleans & Texas Pacific Railway Company entered into immediate possession of the said Cincinnati Southern Railway and its properties, including that in controversy herein, for the term of said lease and has since continuously maintained possession and operation of the same and of said railway under said lease and said extension thereof.

VI.

These defendants admit that prior to the completion of said Cincinnati Southern Railway, and on, to-wit: October 8, 1879, the General Assembly of the State of Georgia passed an act granting to the Trustees of the Cincinnati Southern Railway, for the use of the Cincinnati Southern Railway, all that portion of the right of way of the Western & Atlantic Railroad, between Boyce Station, Tennessee, and the Chattanooga, Tennessee, terminus, that lies westerly of a line running parallel with and nine and one-half feet westerly from the center of the track of the Western & Atlantic Railroad, and they admit that Exhibit A to the original bill is a correct 48 copy of said act of the General Assembly of the State of Georgia. But defendants insist that said act of said General Assembly of the State of Georgia is a grant to defendant Trustees of an easement in the property therein described in perpetuity, and is not a temporary "permission to use," as seems to be the purport of the allegation in paragraph VI. of the bill.

VII.

These defendants say it is true that pursuant to the grant contained in the said act of the General Assembly of the State of Georgia of date October 8, 1879, the Trustees of the Cincinnati Southern Railway took immediate and permanent possession of that portion of the right of way of the Western & Atlantic Railroad lying west of a line nine and one-half feet westerly from the center of the track of the Western & Atlantic Railroad between Boyce Station and Chattanooga, and are now, and for a period of more than thirty-six years last past have been in open, notorious, continuous and adverse pos-

session of the same under said grant, and have, during all that time, occupied the same with the main line track; and with other tracks of said Cincinnati Southern Railway placed thereon prior to August 21, 1916, the date at which the General Assembly of the State of Georgia passed an act attempting to repeal said grant of October 8, 1879, said act being Exhibit C to the bill. These defendants deny that without authority therefor they have occupied and use a greater portion of said right of way than was contemplated or permitted in
said act of October 8, 1879. These defendants say that the
49 description contained in the bill (paragraph VII.) of the
part of the right of way of the Western & Atlantic Railroad between Boyce Station and Chattanooga, in Hamilton County, Tennessee, that is occupied by defendants is not correct, because these defendants say that they do not occupy any portion of said right of way lying between a line drawn seven feet west from the center line of the track of the Western & Atlantic Railroad and a line drawn nine and one-half feet west of said center line, which is the contention made in the bill as to said right of way for the distance of 19,537 feet in length thereof; and defendants say that the strip of said right of way occupied by these defendants is not twenty-six feet wide, as averred in the bill, but only twenty-three and one-half feet wide, except at the beginning and ending points.

Defendants say that said grant of October 8, 1879, required the Trustees of the Cincinnati Southern Railway to adopt for the Cincinnati Southern Railway and always maintain a grade the same as that of the Western & Atlantic Railroad, which they accomplished by widening the top of the embankment of the Western & Atlantic Railroad westwardly at the same grade. Defendants say that in maintenance of ballast on said embankment between the two roadbeds, and in keeping said space free of litter, it was the agreed practice between the two roads to observe a median line between the two roadbeds, and that in the exercise of such practice the track forces on the Cincinnati Southern Railway worked outside of the limits of the grant made by the State of Georgia to the Trustees of the Cincinnati Southern Railway. But these defendants say that such practice and said work did not constitute any encroachment upon the rights of the complainant.

50 These defendants further say that said grant of the State
of Georgia to the Trustees of the Cincinnati Southern Railway authorized the latter to lay track so as to leave the distance between the center of the Western & Atlantic track and the center of Cincinnati Southern Railway track fourteen feet and between the nearest rails of the two railroads nine feet; and these defendants say they have laid no track nearer than that on said right of way, except that for a distance of about nine hundred feet, commencing just north of the Harrison Pike crossing, the tracks of the Cincinnati Southern Railway had to be and were pushed over to the east one foot, which it was necessary to do in order to avoid a concrete abutment of an overhead railroad crossing at that place, which moving of the tracks was done in 1913 with assent and approval given by the Nashville, Chattanooga & St. Louis Railway, then in possession as

lessee of the Western & Atlantic Railroad under a lease thereof made to it by the State of Georgia for a term that does not expire until December 27, 1919.

And as to the allegations of the bill that the defendants encroach upon the easterly side of the right of way of the Western & Atlantic Railroad, between Magnolia Street and Gas Street, for a distance of 1,750 feet and for a width of 26 feet (it is not 26 feet, as alleged in the bill, but only 23½ feet except at the beginning and ending points where it is less), these defendants say that the facts in regard thereto are as follows:

When the main track of the Cincinnati Southern Railway was constructed on the west side of the Western & Atlantic Railroad in 1880 or 1881 as hereinbefore alleged, and was then first opened for operation, the terminal facilities of said Cincinnati Southern Railway at Chattanooga, Tennessee, necessary to be reached by
51 said track were located east of the Western & Atlantic Railroad's said right of way and to the east and south of and adjoining said 1,750-foot strip mentioned in the bill, as the State of Georgia then well knew. Accordingly, in order to reach said terminal facilities it was necessary to construct said main line track, and it was constructed so as to have a crossing over said Western & Atlantic Railroad's right of way at or near said point, and to have an extension thence upon and along said 1,750 foot strip; all with the knowledge and acquiescence of the State of Georgia and of its then lessee, and although the location of said crossing was afterwards moved, with the approval of said lessee and with the knowledge and acquiescence of the State of Georgia, farther north to its present location, yet the same has made no difference in regard to the said use of said 1,750 foot strip.

These defendants further say that such use and occupation of said 1,750 foot strip is the encroachment complained of in the bill of complaint. These defendants say that such use of said 1,750 foot strip has been maintained by the Trustees of the Cincinnati Southern Railway and their lessee by open, notorious, continuous and adverse possession of said strip of 1,750 feet for a period of nearly thirty-six years next prior to the commencement of this suit. And these defendants say that if they have not title to, and right of possession of, said strip of 1,750 feet otherwise, they claim title to and right of possession of the same and also of the 19,537 foot strip by prescription and under and by virtue of the Statutes of the State of Tennessee, which are as follows (Sections 4456, 4457 and 4458 of Shannon's Code of Tennessee):

"4456. Any person having had, by himself or those through whom he claims, seven years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the state of North Carolina, holding by conveyance, devise, grant, or other as-
52 surance of title purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title. But no title shall be vested by virtue of such adverse

possession, unless such conveyance, devise, grant, or other assurance of title shall have been recorded in the register's office for the county or counties in which the land lies during the full term of said seven years' adverse possession.

4457. And, on the other hand, any person, and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, under recorded assurance of title, as in the foregoing section, are forever barred.

4458. No person, or anyone claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued."

VIII.

These defendants say that they do not know what the needs of the Western & Atlantic Railroad were in respect of the right of way in question at the time of the passage of the act of October 8, 1879, nor of its present needs in respect thereof, but in that connection call attention to the fact that, including its present roadbed, it has a forty-two and one-half foot right of way left between Boyce Station and its
Chattanooga terminals, and it is only using a single railroad
53 track on said right of way for the most part of that distance.
Nor do these defendants know what representations were made to the State of Georgia, nor by whom made, as to the good effect that would result to the Western & Atlantic Railroad by the opening of the Cincinnati Southern Railway. These defendants, however, aver that the State of Georgia had no right to assume that no competing line would be built between Atlanta and Chattanooga with which the Cincinnati Southern Railway would do business.

These defendants aver that prior to the passage of said act of October 8, 1879, namely, on June 28, 1879, the Trustees of the Cincinnati Southern Railway had actually located the Cincinnati Southern Railway between Boyce Station and its Chattanooga terminus and had selected therefor a route parallel with and adjoining the Western & Atlantic Railroad's right of way for that distance, and had secured a right of way for said route. And defendants say that said line was not built on that location only because the State of Georgia passed said act of October 8, 1879. They say a material inducement to the State of Georgia to pass said act was that thereby the roadbed of the Western & Atlantic Railroad, through a district subject to overflow by floods in the Tennessee river, would be strengthened and made firmer, and the Western & Atlantic Railroad would thereby be saved expense in maintaining its roadbed, and its railroad operations would be facilitated, and that it would be to its advantage to have its tracks and railroad works and those of the Cincinnati Southern Railway close together. They say that for that reason said grant of October 8, 1879, was made to said Trustees without requiring the payment of any other consideration. They say that the benefits ensuing therefrom to the State of Georgia were of utmost value, and 54 the construction of a roadbed, protecting the right of way of the Western & Atlantic Railroad, has been through all these years and still is a valuable consideration for said grant.

These defendants say they have no knowledge as to what considerations led the General Assembly of the State of Georgia to pass said repealing act of August 21, 1916, but aver that said repeal is wholly nugatory and void, and was beyond the power of the State of Georgia because it is in violation of Article I, Section 10 of the Constitution of the United State, which provides that no state shall pass any law impairing the obligation of contracts, and is in further violation of Article I, Section 20 of the Constitution of Tennessee, which provides that no law impairing the obligation of contracts shall be made, and is in violation of the Constitution of the State of Georgia.

These defendants admit that Exhibit C. to the bill is a correct copy of said act of August 21, 1916.

IX.

These defendants say that it is true that after the passage of the act of August 21, 1916, to-wit: on September 18, 1916, the Trustees of the Cincinnati Southern Railway, for themselves and on behalf of their lessee, the Cincinnati, New Orleans & Texas Pacific Railway Company, filed with the Governor of the State of Georgia and with the Western & Atlantic Railroad Commission a formal declaration in writing refusing to recognize and accept the provisions of said act of August 21, 1916, and avowing that their ownership and possession of said right of way under said grant of October 8, 1879, was 55 not and could not be prejudiced by said act of August 21, 1916, and accordingly these defendants declined to accept any proffer extended by said act of August 21, 1916.

These defendants say that Exhibit D. to the bill is a correct copy of said declaration.

X.

These defendants say that the grant to the Trustees of the Cincinnati Southern Railway referred to in paragraph 10 of the bill is not a revocable license and is not for a limited use and occupation, but that the grant is perpetual and irrevocable without the consent of these defendants, and they deny that said grant has been revoked, and deny that the present use and occupation by these defendants of said right of way is unlawful, and deny that the operation of trains thereover by the Cincinnati, New Orleans & Texas Pacific Railway Company is without authority of the State of Georgia, and deny that such operation of trains is a trespass or is any grievance whatever to said state, and deny that it occasions said state any injury whatever.

XI.

These defendants admit that the Trustees of the Cincinnati Southern Railway own and possess for the use of said railway a right of way adjacent to and parallel with the right of way of the Western & Atlantic Railroad from Boyce Station to Chattanooga, Tennessee. They say that said right of way for its greater distance is only one hundred feet wide, and for most of the remaining distance 56 is only one hundred and fifty feet wide; that for eleven hundred and fifteen feet in length it is only two hundred feet wide, and for twelve hundred feet the width varies from one hundred feet to fifty feet. These defendants say that said right of way was acquired by said Trustees for the purpose of locating thereon the Cincinnati Southern Railway tracks between Boyce Station and Chattanooga prior to the passage of the Georgia grant of October 8, 1879; that the Georgia grant was mutually beneficial to the Cincinnati Southern Railway and to the Western & Atlantic Railroad in cheapening the construction of the former and in supporting and strengthening the embankment and roadbed of the latter. Therefore the location of the Cincinnati Southern Railway was changed in order to utilize the Georgia grant. These defendants say that in the meantime and prior to August 21, 1916, much of the Cincinnati Southern Railway's adjacent right of way has been utilized at the southern end for extensive railroad yardage, and that the remainder of said right of way is not adequate in character for main track purposes, inasmuch as large expenditure would be necessary in order to adapt it to such use. These defendants deny that it would work no injustice to them and would impose no hardship upon them and would not in any way impair their ability to serve the public as a common carrier should they be required to remove their track from the right of way granted them by the State of Georgia and relocate the same elsewhere. They say that to make such relocation would not only involve tremendous expense of grading and track laying, but would involve a rearrangement of extensive yards, involving great expense and loss of track room, and would result in donating to the State of Georgia all of the embankment and cuts and 57 other roadbed construction that was done by the Trustees of the Cincinnati Southern Railway in utilizing the Georgia grant.

These defendants deny that the width of right of way left to the Western & Atlantic Railroad is only forty feet, and say the same is forty-two and one-half feet, on which the Western & Atlantic Railroad has only one track, and that there is more than ample room on the right of way left for another main track for the Western & Atlantic Railroad.

XII.

These defendants say that they have from time to time since A. D. 1881 and prior to the passage of said act of August 21, 1916, with

the full knowledge, acquiescence and consent of the State of Georgia and its lessee, constructed, maintained and improved the Cincinnati Southern Railway, located and built as aforesaid on said strip of land granted by the State of Georgia, at an expense of many hundreds of thousands of dollars, and in addition thereto these defendants have from time to time prior to August 21, 1916, with the full knowledge, consent and acquiescence of the State of Georgia and its lessee, paid their portion of the cost of the construction of three very expensive viaducts over said Western & Atlantic Railroad's right of way between Boyce Station and Chattanooga; that the cost to the railroads of said viaducts was divided by agreement between these defendants and the State of Georgia or its representatives whereby the defendants paid such part of the said cost as was proportioned to the width of the Western & Atlantic Railroad's right of way included in
58 said grant of October 8, 1879, and the said State of Georgia or its lessee paid the remaining part.

XIII.

These defendants say that the complainant is not entitled to any relief because: (*a*) The act of the General Assembly of the State of Georgia of October 8, 1879, is a grant in perpetuity and is irrevocably without the consent of these defendants; (*b*) The act of the General Assembly of the State of Georgia of August 21, 1916, purporting to repeal said act of October 8, 1879, is in contravention of Article I, Section 10 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contract; (*c*) Said act of August 21, 1916, is in contravention of Article I, Section 20 of the Constitution of Tennessee, which provides that no law impairing the obligation of contract shall be passed; and (*d*) is in contravention of the Constitution of the State of Georgia, Article I, Section 2.

XIV.

These defendants further say that on, to-wit, July 19, 1890, the State of Georgia did demise and lease unto the Nashville, Chattanooga & St. Louis Railway, a corporation, the Western & Atlantic Railroad, running from the City of Atlanta, in the State of Georgia, to and into the City of Chattanooga, in the State of Tennessee, together with all its houses, workshops, rolling stock, depots and appurtenances of every kind and character, for the term of twenty-nine years
59 next ensuing December 27, 1890, which term therefore ends December 27, 1919; that the said lessee at all times since the commencement of said term has been in exclusive possession of all the said demised premises, and that the complainant herein has had no possession thereof or right of possession thereof since the commencement of said term.

These defendants further say that on May 11, 1917, the term of said lease was duly extended for a period of fifty years next ensuing said December 27, 1919.

And so these defendants say that the complainant in this case, being neither in possession nor entitled to possession of said premises, can not maintain this suit.

XV.

These defendants say that if there has been any encroachment by them or either of them upon any land of the State of Georgia lying outside the limits of the grant of October 8, 1879, such encroachment, except the slight encroachment of one foot for 900 feet in length mentioned in Paragraph VII. hereof, occurred and the right of action therefor accrued more than seven years before the commencement of this suit and is barred by the statute of limitations of the State of Tennessee heretofore referred to in Paragraph VII. hereof.

XVI.

These defendants further say that complainant has no right to maintain this action for the following reasons:

(*a*) For want of equity appearing on the face of the bill.

60 (*b*) Because complainant has a plain and adequate remedy at law.

And having thus fully made answer to said bill, these defendants pray to be hence dismissed with costs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY,
By LEVI C. GOODALE, *President of the Board.*
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By THOMAS C. POWELL, *Vice-President.*
WASHINGTON T. PORTER,
JOHN WELD PECK,
HENRY T. HUNT,
Solicitors for Trustees of Cincinnati Southern Railway.
EDWARD COLSTON,
MICHAEL M. ALLISON,
Solicitors for The Cincinnati, New Orleans & Texas Pacific Railway Company.

EDWARD COLSTON,
MICHAEL M. ALLISON,
Counsel for Defendants.

STATE OF OHIO,
Hamilton County, ss:

Levi C. Goodale, Trustee of the Cincinnati Southern Railway and one of the defendants in the above cause, and President

61 of the Board of Trustees of said Cincinnati Southern Railway, having read the foregoing answer and being duly sworn, says that the matters and things therein contained are true.

LEVI C. GOODALE.

Subscribed and sworn to before me this 26th day of September, 1917.

[SEAL.]

EUGENE BRUNSMAN,
Notary Public, Hamilton County, Ohio.

STATE OF OHIO,
Hamilton County, ss:

Thomas C. Powell, Vice-President of the Cincinnati, New Orleans & Texas Pacific Railway Company, one of the defendants in the above cause, having read the foregoing answer and being duly sworn, says that the matters and things therein contained are true.

THOMAS C. POWELL.

Subscribed and sworn to before me this 26th day of September, 1917.

[SEAL.]

EUGENE BRUNSMAN,
Notary Public, Hamilton County, Ohio.

Office Supreme Court U. S. Filed Oct. 1, 1917. James D. Maher, Clerk.

62 And, afterwards, towit, on the 22d day of October, A. D. 1917, the following entry appears of record, viz:

No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY et al.

On motion of Mr. C. B. Ellis, in behalf of counsel for the complainant, leave is hereby granted to file replication herein.

October 22, 1917.

Which said motion is in the words & figures following, viz:

63 In the Supreme Court of the United States, October Term, 1917.

No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Application for Leave to File Replication.

To the Honorable the Supreme Court of the United States:

Now comes The State of Georgia, the plaintiff in the above entitled cause, by William A. Wimbish, its counsel, and presents herewith its replication to the joint and several answer filed by the defendants herein, and respectfully prays the Court to enter an order allowing said replication to be filed herein in behalf of the said plaintiff.

WILLIAM A. WIMBISH,
Counsel for Plaintiff, The State of Georgia.

64 And on the same day, towit, the 22d day of October, A. D. 1917, the Replication was filed in words & figures following, viz:

In the Supreme Court of the United States, October Term, 1917.

No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Replication of the Above Named Plaintiff to the Joint and Several Answers of the Above Named Defendants.

The State of Georgia, repliant, saving and reserving unto itself all advantage of exception to the insufficiencies of the joint and several answer of The Trustees of the Cincinnati Southern Railway and The Cincinnati, New Orleans & Texas Pacific Railway Company, the defendants herein, for replication thereunto says that
65 The State of Georgia will aver and prove its bill of complaint in this cause to be true, certain, and sufficient in law to be answered unto, and that the said answer is uncertain, untrue, evasive

and insufficient in law to be replied unto by this repliant; all of which this repliant is and will be ready to aver and prove as this Honorable Court shall direct; and prays as in and by its said original bill it has already prayed.

WILLIAM A. WIMBISH,
Counsel for Plaintiff, The State of Georgia.

Office Supreme Court U. S. Filed Oct. 22, 1917. James D. Maher, Clerk.

66 And on the same day, towit, the 22d day of October, A. D. 1917, the following entry appears of record, viz:

No. 23, Original.

THE STATE OF GEORGIA, Complainant,
vs.
THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY et al.

Mr. C. B. Ellis, in behalf of counsel for the complainant, submitted to the consideration of the Court a motion for an order for the taking of the testimony in this cause.
October 22, 1917.

Which said motion is in the words & figures following, viz:

67 In the Supreme Court of the United States, October Term, 1917.

No. 23, Original.

THE STATE OF GEORGIA, Complainant,
vs.
THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Application for Order for the Taking of Testimony.

To the Honorable the Supreme Court of the United States:

The above entitled cause being at issue under the pleadings filed herein, now comes the plaintiff, The State of Georgia, by William A. Wimbish, its counsel, and respectfully prays the Court to enter herein an appropriate order providing for the taking of the testimony and the submission of evidence in this cause before an Examiner or Commissioner to be appointed by this Court within such time and in such manner as the Court shall direct.

WILLIAM A. WIMBISH,
Counsel for Plaintiff, The State of Georgia.

Office Supreme Court U. S. Filed Oct. 22, 1917. James D. Maher, Clerk.

68 And afterwards, towit, on the 14th day of January, A. D. 1918, the following entry appears of record, viz:

No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY et al.

Mr. William A. Wimbish, of counsel for the complainant, submitted to the consideration of the Court a motion for the appointment of an examiner to take testimony in this cause.
January 14, 1918.

Which said motion and stipulation are in the words & figures following, viz:

69 In the Supreme Court of the United States, October Term, 1917.

No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Application for Appointment of Examiner to Take Testimony.

To the Honorable the Supreme Court of the United States:

Now comes the complainant, The State of Georgia, and the defendants, The Trustees of the Cincinnati Southern Railway, and The Cincinnati, New Orleans & Texas Pacific Railway Company, by their respective counsel, and move the Court that Edward L. Gilmore, of Atlanta, Georgia, be appointed Examiner to take testimony
70 and receive the evidence in this cause in accordance with the

stipulation hereto attached, and to have power to administer oaths to witnesses he may examine.

THE STATE OF GEORGIA,
Complainant,
By WILLIAM A. WIMBISH,
Its Counsel.
THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY,
By W. L. PORTER AND
J. W. PECK,
Their Counsel.
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By EDWARD COLSTON AND
M. M. ALLISON,
Its Counsel.

71 In the Supreme Court of the United States, October Term, 1917.

No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Stipulation for the Taking of Testimony.

The parties to this case, acting herein by their respective counsel of record, stipulate and agree, subject to the approval and order of the Court, as follows, to-wit:

I. That Edward L. Gilmore, of Atlanta, Georgia, be appointed Examiner to take and return the testimony and evidence in this cause offered in behalf of the respective parties hereto.

II. That the said Examiner shall take and transcribe the oral testimony offered, and return a fair transcript thereof to the Clerk of this Court in the manner and according to the methods provided in the Federal Equity Rules for the taking of testimony before an Examiner.

72 III. That the said Examiner shall receive such documentary evidence as may be offered in behalf of either party, and shall transmit the same to the Clerk of this Court, together with a brief memorandum stating by whom the evidence was offered, and any objections that may be made thereto.

IV. That such stipulation of facts as the parties may agree upon and enter into may either be received by the Examiner, and by him transmitted to the Clerk of this Court as a part of the record, or such stipulation may be sent direct to the Clerk of the Court if the parties so prefer and agree.

V. The taking of testimony before the Examiner in support of the bill shall begin at eleven o'clock A. M. on the twenty-ninth day of January, 1918, or such early day thereafter as counsel for the respective parties shall agree upon, and shall be completed within thirty (30) days next ensuing. Upon the completion of the taking of testimony in chief the defendants shall within thirty (30) days thereafter take their evidence in defense, negative and affirmative. Should further time be desired by the complainant within which to take evidence in reply, and in such case should the defendants desire to offer evidence in rejoinder, each party shall have ten (10) days, respectively, within which to present such evidence.

The testimony shall be taken at such times and places as counsel for the respective parties may agree upon, or in the absence of such agreement, may be taken in accordance with the requirements of Federal Equity Rule No. 53: Provided, however, that the times for taking the evidence as above prescribed may be extended by agreement, or by the Examiner upon the application of either party upon reasonable notice to the other party and opportunity given to be heard.

73 VI. That forthwith after the taking of the testimony and the submission of documentary evidence shall have been completed, the Examiner shall make up a record of the proceedings had, and transmit the same to the Clerk of this Court, which record shall include the documentary evidence submitted, together with the original transcript of the oral testimony taken before him; all of which shall be forthwith opened by the Clerk of this Court upon receipt thereof.

VII. That the said Examiner shall receive as his sole compensation for all services rendered, and for all testimony taken and transcribed, the sum of $10.00 per day for each day when actually engaged in the taking of testimony and the reception of evidence, and the further sum of 25 cents per page for each page of testimony transcribed, and the further sum of 12½ cents per page for each carbon copy thereof, together with reasonable traveling expenses actually incurred in the taking of the testimony.

Dated this fourth day of January, 1918.

THE STATE OF GEORGIA,
Complainant,
By WILLIAM A. WIMBISH,
Its Counsel.
THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY,
By W. L. PORTER AND
J. W. PECK,
Their Counsel.
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By EDWARD COLSTON AND
M. M. ALLISON,
Its Counsel.

Office Supreme Court U. S. Filed Jan. 14, 1918. James D. Maher, Clerk.

And afterward, to-wit, on the 21st day of January, A. D. 1918, the following entry appears of record, viz:

74 Supreme Court of the United States, October Term, 1917.

No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY COMPANY and The Cincinnati, New Orleans and Texas Pacific Railway Company.

On consideration of the joint motion and stipulation of counsel for the respective parties in this cause,

It is now here ordered by the Court that Edward L. Gilmore, of Atlanta, Georgia, be, and he is hereby, appointed to take and return the testimony and evidence in this cause; that the said Examiner shall take and transcribe the oral testimony offered, and return a fair transcript thereof to the clerk of this Court in the manner and according to the methods provided in the Federal Equity Rules for the taking of testimony before an Examiner; that he shall receive such documentary evidence as may be offered in behalf of either party, and shall transmit the same to the Clerk of this Court, together with a brief memorandum stating be whom the evidence was offered, and any objections that may be made thereto; that such stipulation of facts as the parties may agree upon and enter into may either be received by the Examiner, and by him transmitted to the Clerk of this Court as a part of the record, or such stipulation may be sent direct to the Clerk of the Court if the parties so prefer and agree.

75 It Is Further Ordered that the taking of testimony before the Examiner on behalf of the complainant shall begin on January 29th, 1918, at eleven o'clock A. M., or such early day thereafter as counsel for the respective parties shall agree upon, and shall be completed within thirty days next ensuing. Upon the completion of the taking of the testimony in chief the defendants shall within thirty days thereafter take their evidence in defense, negative and affirmative. Should further time be desired by complainant to take evidence in reply, and in case the defendants should desire to offer evidence in rejoinder, each party shall have ten days, respectively, within which to present such evidence.

The testimony shall be taken at such times and places as counsel for the respective parties may agree upon, or, in the absence of such agreement, may be taken in accordance with the requirements of Federal Equity Rule No. 53; Provided, however, that the times for taking the evidence as above prescribed may be extended by agreement or by the Examiner on the application of either party upon reasonable notice to the other party and opportunity given to be heard; that forthwith after the taking of the testimony and the submission of documentary evidence shall have been completed, the Examiner shall make up a record of the proceedings had, and transmit the same to the Clerk of this Court, which record shall include the documentary evidence submitted, together with the original transcript of the oral testimony taken before him; all of which shall be forthwith opened by the Clerk of this Court upon receipt thereof.

It Is Further Ordered that the said Examiner shall receive as his sole compensation for all services rendered, and for all testimony taken and transcribed the sum of $10.00 per day for each day when actually engaged in the taking of testimony and the reception 76 of evidence, and the further sum of 25 cents per page for each page of the testimony transcribed, and the further sum of 12½ cents per page for each carbon copy thereof, together with reasonable traveling expenses actually incurred in the taking of the testimony.

January 21, 1918.

(Endorsed:) Supreme Court U. S. October Term, 1917. Term No. 23, Original. Order. Filed January 21, 1918.

And afterwards, towit, on the 20th day of May, 1918, the following entry appears of record, viz:

77 No. 23, Original.

The State of Georgia, Complainant,

vs.

The Trustees of the Cincinnati Southern Railway et al.

Mr. Challen B. Ellis, in behalf of counsel submitted to the consideration of the Court a motion to open and print the evidence in this cause, for directing the filing of briefs, and for assigning the cause for oral argument.

May 20, 1918.

Which said motion is in words & figures following, viz:

78 In the Supreme Court of the United States, October Term, 1917.

No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Application for Order to Open and Print the Evidence, for Directing the Filing of Briefs, and for Assignment of the Above-entitled Cause for Oral Argument.

To the Honorable the Supreme Court of the United States:

The taking of the testimony and the submission of evidence having been completed pursuant to an order of this Honorable Court
79 in this cause, and having been transmitted to and received by the Clerk of this Court, and the record in the case having been closed:

Now come the parties to said cause by their respective counsel, and pray that the Court will enter appropriate orders herein, providing:

1. That the Clerk of the Court do open and cause to be printed the testimony and record in the case.

2. That printed briefs of counsel be filed in the order and at the times as follows, to wit:

(*a*) Brief of counsel for complainant to be filed on or before August 15th, 1918.

(*b*) Brief in behalf of the defendants to be filed on or before October 1st, 1918.

(*c*) Reply brief in behalf of complainant to be filed on or before five days preceding the date of argument.

(*d*) Counsel for the respective parties may by mutual agreement change the time within which the respective briefs shall be filed, provided that all briefs shall be filed not later than five days preceding the date of the argument.

80 3. That the case be assigned for oral argument before the Court at such early day in the next October, 1918, term of the Court as may be convenient and agreeable to the Court.

Respectfully submitted,

WILLIAM A. WIMBISH,
Counsel for Complainant,
The State of Georgia.
JOHN W. PECK,
WASHINGTON T. PORTER,
Counsel for Defendant,
Trustees for The Cincinnati Southern Railway.
EDWARD COLSTON,
M. M. ALLISON,
Counsel for Defendant,
The Cincinnati, New Orleans & Texas Pacific Railway Co.

Office Supreme Court, U. S. Filed May 20, 1918. James D. Maher, Clerk.

And afterwards, towit, on the 3d day of June, A. D. 1918, the following entry appears of record, viz:

81 No. 23, Original.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY et al.

On consideration of the joint motion of counsel for the respective parties to open and publish the testimony, to fix the dates for the filing of the respective briefs and assign the case for oral argument,

It is now here ordered by the Court that the Clerk do open and cause to be printed the testimony and record in this case; that printed briefs of counsel be filed in the order and at the times as follows, to wit: Brief of counsel for complainant to be filed on or before August 15th, 1918; Brief in behalf of the defendants to be filed on or before October 1st, 1918; Reply brief in behalf of complainant to be filed on or before five days preceding the date of argument;

Counsel for the respective parties may by mutual agreement change the time within which the respective briefs shall be filed, provided that all briefs shall be filed not later than five days preceding the date of the argument.

It is further ordered that this case be assigned for argument on Monday, October 14th next, after the cases heretofore assigned for that day.

June 3, 1918.

82 In the Supreme Court of the United States. October Term, 1917.

No. 23.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company.

Atlanta, Ga., Jan. 29, 1918.

Before Edward L. Gilmore, Examiner.

Pursuant to the Order of the Supreme Court herein, this cause was called for the beginning of the taking of testimony in behalf of the Complainant at 11 o'clock A. M. Tuesday, January 29th, 1918, at 525 Grant Building, Atlanta, Georgia.

Counsel for the Complainant, William A. Wimbish, Esq., appearing in person, presented written consent, concurred in by him, from Edward Colston, Esq., and M. M. Allison, Esq., counsel for the Defendants, that the beginning of the taking of testimony be postponed until Thursday, February 7th, 1918, at 11 o'clock A. M.

Thereupon the beginning of the taking of the testimony in behalf of the Complainant was postponed until February 7th, 1918, at 11 o'clock A. M. at 525 Grant Building, Atlanta, Ga.

83 In the Supreme Court of the United States, October Term, 1917.

No. 23.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Atlanta, Ga., February 4th, 1918.

Before Edward L. Gilmore, Examiner.

It being found impossible for either counsel for the Complainant or the Defendant to be present for the beginning of the taking of testimony on February 7th, 1918, pursuant to adjournment heretofore had, it was mutually agreed between counsel that the same be again postponed to-wit until the 19th day of February, 1918, at eleven o'clock A. M. at the office of counsel for Complainant, 525

Grant Building, Atlanta, Georgia, and the Examiner was duly notified by mail.

84 In the Supreme Court of the United States, October Term, 1917.

No. 23.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Atlanta, Ga., February 19th, 1918.

Before Edward L. Gilmore, Examiner.

Pursuant to agreement between counsel herein, this case was called for the beginning of the taking of testimony in behalf of the Complainant at eleven o'clock A. M. this Tuesday, February 19th, 1918, at 525 Grant Building, Atlanta, Georgia. The following counsel representing the parties hereto were present:

William A. Wimbish, Esq., of Atlanta, Ga., for the complainant.

John W. Peck, of Cincinnati, Ohio, for the defendant, The Trustees of the Cincinnati Southern Railway.

Edward Colston, Esq., of Cincinnati, Ohio, and M. M. Allison, Esq., of Chattanooga, Tenn., for the defendant the Cincinnati, New Orleans and Texas Pacific Railway Company.

Complainant's counsel submitted to counsel for the defendants certain proposed stipulations, and after consultation a recess 85 was taken until two o'clock P. M. that same might be examined by counsel for defendants and agreed upon.

Upon reassembling at two o'clock P. M. this Tuesday, February 19th, 1918, the hearing proceeded as follows:

J. H. JOHNSTON, a witness called on behalf of the complainant, having been first duly sworn by the Examiner, testifies as follows:

Direct examination.

By Mr. Wimbish:

Q. Mr. Johnston will you please give your address?

A. 121 State Capitol, Atlanta, Georgia.

Q. Your occupation?

A. I am a civil engineer.

Q. State what experience you have had as an engineer, and especially with respect to railroad engineering?

A. I have been in the profession of civil engineering a little over thirty years, and nearly all of that time in the location and construction and maintenance of railroads.

Q. What official connection have you with the State of Georgia, under or through the Western Atlantic Railroad Commission?

A. Since the organization of the Commission, practically, I have been the Special Engineer in charge of the engineering work of the Commission. That was the 1st of January, 1916. The commission was organized in the fall of 1915.

Q. Aren't you mistaken about that,—wasn't it organized before that?

86 A. No, I think not. It was organized in the fall of 1915, I am sure, and got into shape the first of January 1916.

Q. Now, in your capacity as Special Engineer for the Western Atlantic Railroad Commission, did you examine or did you become familiar with the Western and Atlantic Railroad?

A. Yes sir, I made a study of everything about it.

Q. Are you familiar with the property in controversy, that is, that portion of the right of way of the Western and Atlantic Railroad lying between Boyce Station and Chattanooga, Tennessee, occupied and claimed by the Trustees of the Cincinnati Southern Railway and their licensee, the Cincinnati, New Orleans, and Texas Pacific Railway Company?

A. I am.

Q. Did you prepare a map or plat of this property showing the encroachment thereon by the defendants I have named?

A. It was done under my direction and in my office.

Q. Please state whether or not Exhibit B to the original bill is a correct copy or reproduction of this map or plat?

Mr. Peck: With reference to the question concerning encroachment, we wish to object to the assumption that there is an encroachment.

A. It is a photograph—a photographic reproduction of the map which was prepared in my office.

Q. On a reduced scale?

A. Yes, sir, a photographic map.

Q. Please refer to the description of this occupation of the right of way of the Western and Atlantic Railroad by the defendants, 87 at pages seven to nine of the original bill and state if you prepared that description?

A. Yes, sir, that was prepared by me.

Q. Why did you describe the line defining the occupation or encroachment as being only seven feet from the center of the track of the Western and Atlantic Railroad?

A. For the reason that in attempting to keep that portion of the right of way nearer than—I mean further from the center of the right of way than seven feet would constitute a menace to operation of trains on the Cincinnati Southern. It was a legal clearance between the two tracks.

Q. Do I understand you to mean that there must be a clearance between any one of the tracks of these two roads and another, a space between that would be occupied safely by passing cars?

A. Yes sir.

Q. What is the extent of that clearance as usually regarded?

A. Fourteen feet, or seven feet rather. Fourteen feet between centers of tracks, and seven feet between nearest obstruction.

Q. Does your plat or survey show anything with reference to clearance?

A. No, sir, it does not.

Q. Please state whether the adverse occupation or encroachment is clearly shown on the plat attached as Exhibit B to the bill?

Mr. Peck: We object to that for the reason that it assumes an encroachment and also because it leads the witness as to the contents of the entire plat.

Mr. Wimbish: Well, I want the witness to explain what the
88 plat shows as to encroachment.

Q. I ask if that plat does clearly show the adverse occupation by the defendants of the right of way of the Western and Atlantic Railroad?

Mr. Peck: The same objection to the last question.

Mr. Colston: We have no objection to your showing what the plat shows.

Q. You can answer the question?

A. The plat assumes the occupation by the Cincinnati Southern of the right of way to a line within seven feet of the center line of the Western and Atlantic Railroad.

Q. First describe what is the adverse use and occupation by the Cincinnati Southern Railway, take it up from the beginning?

A. It would be twenty-three and one-half feet.

Mr. Peck: We object to the question——

Q. I want you to begin at Boyce station and state specifically, describe what is the adverse occupation that we claim to be an encroachment?

A. Well, beginning at a point 480 feet toward Chattanooga from mile post 182, the Cincinnati Southern track is on the right of way of the Western and Atlantic Railroad for a width of twenty-three and one-half feet, the width of the tracks of twenty-three and one-half feet extending toward Chattanooga for a distance of 19,537 feet—lies west of the line and running parallel with it about nine and one-half feet from the center of the track of the Western and Atlantic Railroad, and as I say, extending towards Chattanooga for a distance of 19,537 feet, it being continuously twenty-three and a half feet wide, except at the beginning and ending points. There is also another occupation by the Cincinnati Southern beginning at
89 a point near Magnolia Street and extending towards Chattanooga for a distance of 1,750 feet, being twenty-three and one-half feet wide except at the beginning and ending points.

Q. Does that describe the entire encroachment?

A. Yes, sir.

Mr. Peck: We object to that question as assuming an encroachment.

A. (Continuing:) I did not state that the first encroachment, while it is *statement* in the plat, is on the right hand side going towards Chattanooga, and the last one is on the left hand side.

Q. The tracks of the Cincinnati Southern cross the Western and Atlantic Railroad?

A. Yes sir.

Q. From one side to the other?

A. Yes sir.

Q. And on which side is the first encroachment leading from Boyce Station?

Mr. Peck: We object to the use of the word "Encroachment."

A. It is on the right hand side going to east end crossing and on the left hand side from there on King that 1,750 feet from Magnolia Street north is on the left hand side, the opposite side.

Q. Will you briefly describe the physical situation of this right of way between Boyce and Chattanooga indicating its topography and physical features?

A. Well, the general topography of the country is rolling, with not very large cuts or *file*, the deepest fill being probably about twenty feet at its deepest point in the ravine, and the heaviest cutting about twelve to fifteen feet. It is, of course, a *serious* of cuts and
90 fills, not any of them excessive.

Q. Well, now describe how the road bed occupied by the Cincinnati Southern and its lines adjoins that of original embankment of the Western and Atlantic Railroad?

A. It is a continuation, a widening of the old road bed of the Western and Atlantic Railroad.

Q. To what extent is or was the road bed and embankment of the Western and Atlantic Railroad affected or damaged by high water resulting from the overflow of the Tennessee River?

Mr. Peck: We object to the question as being immaterial, incompetent and irrelevant.

A. I do not see that it affected it one way or the other.

Q. What was the character of the water that rose?

A. It is all back water from the Tennessee River. There is no current at that point.

Q. Well, to what extent, if any, does this back water cause damage or injury to the road bed or embankment?

A. My observation is it has not caused any at all. I was there in a time of high water and in my judgment it does not cause any damage at all.

Q. Now, if the Cincinnati Southern Railway had constructed its road bed and tracks on its own right of way adjacent to but not upon the right of way of the Western and Atlantic Railroad, what would have been the effect in so far as concerns protection to the Western and Atlantic Railroad against damage from high water resulting from floods in the Tennessee River?

A. I do not think it would have materially affected it one way or the other.

91 Q. Does the Cincinnati Southern Railway, or its lessee, the Cincinnati, New Orleans and Texas Pacific Railway Company own a right of way and property adjacent to that of the Western and Atlantic Railroad between Boyce Station and Chattanooga, Tennessee?

Mr. Peck: We object to that as irrelevant immaterial and incompetent and not subject to proof in this way.

A. Yes sir.

Q. Please state whether or not, in your opinion as an*d* engineer, the tracks of the Cincinnati Southern at present and the right of way of the Western and Atlantic Railroad, could be easily shifted to its own adjacent right of way?

Mr. Peck: We object to that as irrelevant, immaterial and incompetent.

A. I believe they could be built on their own right of way, yes sir.

Mr. Colston: That question is leading, too, very leading.

Q. What would be necessary to make the change Mr. Johnston?

A. They would have to build embankments and cuts and lay their own track on their own right of way.

Q. To what extent has that already been done?

A. For a part of the distance they have tracks already on their own right of way, yard tracks.

Q. What is the extent of the right of way of the Cincinnati Southern Railway of the Cincinnati, New Orleans and Texas Pacific Railway adjacent to that of the Western and Atlantic Railroad between the points named Boyce and Chattanooga,—how much right of way have they along there?

92 A. They have varying widths, from one hundred feet upward. I do not know the widest point, it is so wide I do not really know the full extent of it. In some places it is over three hundred feet.

Q. What is the minimum width of it?

A. One hundred feet.

Q. What is the width of the right of way of the Western and Atlantic Railroad between Boyce and Chattanooga?

A. Sixty-six feet.

Q. Have you examined the records in Hamilton County, Tennessee, and can you state whether or not on October 8, 1879, the Trustees of the Cincinnati Southern Railway had secured a right of way between Boyce and Chattanooga, and if so, how much of the right of way had been secured?

Mr. Peck: We object to that as irrelevant, immaterial and incompetent, and not the proper way to prove it.

A. I can't say that they had purchased all of the right of way, or how much they lacked of having purchased all of it. I know that there are deeds on file in the records of Hamilton County subsequent to October eighth, 1879, for right of way to the Cincinnati Southern Railway between Boyce and Chattanooga, and various deeds.

Q. How many deeds of that kind?

A. I found ten deeds subsequent to that date.

Q. What, if any, did you find filed in with the record of those deeds acquired or taken subsequent to October 8th, 1879?

Mr. Peck: We object to that as not properly proven.

A. Many of them have a sketch or plat of the right of way the located line of the Cincinnati Southern through these tracts of land which they were seeking to purchase.

93 Q. Well, if the Cincinnati Southern Railroad had been built along the line of that location, would it have encroached upon the right of way of the Western and Atlantic Railroad?

A. It would not.

Mr. Wimbish: You may examine the witness.

Cross-examination.

By Mr. Peck:

Q. When did you first become familiar with the Western and Atlantic right of way?

A. About the 15th of September, 1915.

Q. Prior to that time where did you live?

A. How long prior?

Q. Well, immediately prior thereto.

A. I lived in the State of Georgia. I was Field Engineer and Construction Engineer for the Savannah and Northwestern Railroad.

Q. For how long?

A. I had been there since the 15th of February of that same year.

Q. Prior to that time what had been your occupation?

A. I had been in the employ of the A. B. and A. in the valuation department of the A. B. and A. Railroad as Field Engineer and——

Q. What do you mean by the "A. B. and A."?

A. The Atlanta, Birmingham and Atlantic Railroad, for about a year, prior to that time, I had been in the employ of the Kaul Lumber Company at Birmingham, Alabama, building railroads and townsites at Tuscaloosa. Prior to that time I was with the Carey Land Company of Birmingham Superintendent of Construction.
Prior to that time I was with the Graves-Matthews Develop-
94 ment Company. How far do you wish me to go back?

Q. That is as far as I care for you to go, but if you wish to go further back, you are at liberty to do so.

A. I can go back a little further if you wish. I worked for the Louisville and Nashville Railroad Company for eighteen years off and on.

Q. What is your exact connection with the Western and Atlantic at this time?

A. I am Special Engineer for the Western and Atlantic Railroad Commission, which was appointed by the Legislature.

Q. Are you regularly in the employ of the Commission?

A. Yes sir.

Q. That is the State of Georgia, in effect?

A. The State of Georgia.

Q. And I presume you are under salary?

A. I am.

Q. Now, prior to 1916, or the fall of 1915, you were not familiar with this piece of right of way from Boyce Station to Chattanooga?

A. No.

Q. This map that you have had prepared and a reduced reproduction of which is attached to the bill in this case, as Exhibit "B," shows what is marked as "Encroachment by Cincinnati Southern Railway" that encroachment, or what is called encroachment, upon this western side is marked by a dotted line. What is the location of that dotted line?

A. The bill states what it is.

Q. I want you to state now.

A. That is a line seven feet from the center line of the main line
of the Cincinnati Southern Railway,—seven feet parallel with
95 the center line of the Cincinnati Southern Railway.

Q. That dotted line does not indicate any fence or any other physical division to be found on the ground between these two railroad tracks?

A. There is none that I know of. It is an imaginary line.

Q. An imaginary line that you took?

A. An imaginary line.

Q. That is seven feet from the center of the Cincinnati Southern Railroad and seven feet from the center of the Western and Atlantic Railroad, is that correct?

A. To a point where the Cincinnati Southern diverges so it cannot be seven feet from the center.

Q. But throughout the parallel course of these tracks have you drawn this line midway between the two tracks?

A. Midway between the two tracks, yes sir.

Q. Yes, and you have assumed for the purpose of this plat that the Cincinnati Southern Railway occupy the space to the west, or east of the center line of its tracks by seven feet?

A. Yes, that is right.

Q. As a matter of fact the track,—the nearest rail of the track of the Cincinnati Southern Railway is how far from the near rail of the Track of the Western and Atlantic Railway?

A. Approximately nine feet.

Q. You understand that I mean the distance from the——

A. The *distant* between the two near rails, yes sir.

Q. Yes. The western rail of the Western and Atlantic
96 and the eastern rail of the Cincinnati Southern?

A. Practically nine feet.

Q. Apart?

A. Yes sir.

Q. Now, when you say "Practically nine feet" what do you mean by that?

A. Well, if you take the rail itself, it is usual to refer to the gauge side of the rail. Now the gauge side of the two rails would be a little bit more than the nine feet.

Q. Well, how far would it be from the gauge side of one rail to the gauge side of the other?

A. It would be nine feet three and a half inches, to be exact.

Q. Well, if the Cincinnati Southern Railway has the right of laying its track near enough to the track of the Western and Atlantic Railroad to leave the distance between the centers of tracks fourteen feet, the present occupation is in accordance with that right, is it not?

A. Well, it resolves itself down into that question of "if."

Q. Yes, that is put in it, that is the basis of my question.

A. I will answer "yes" to that question.

Q. And if the Cincinnati Southern Railway has a right to so lay its tracks that the distance between the closest rails of the roads is nine feet, its present occupancy is in conformity with that right, is it not?

A. Yes sir.

97 Q. Now, you stated, if I understood you correctly, that the Cincinnati Southern Railway occupy what you term as the right of way of the Western and Atlantic Railway to a width of twenty-three and one half feet at the Chattanooga end of this strip in question for a distance of 1,750 feet. In what way do they occupy that?

A. In a similar way to the occupation between East End Avenue and Boyce. In other words the track is on the right of way, and this clearance distance is this line shown by that dotted line. That track does not parallel except for a short distance the track of the Western and Atlantic Railroad.

Q. The Cincinnati Southern Railway is parallel and about fourteen feet center to center from the Western and Atlantic Railroad and lies on the westerly side of the Western and Atlantic Railroad from Boyce Station to a point in Chattanooga. How would you designate that point?

A. Well, the way to describe it is to the interlocking tower near East End Avenue.

Q. Yes, at that point, the Cincinnati Southern Railway crosses the track of the Western and Atlantic Railway from the west to the east, does it not?

A. Well, assuming that the general direction there *is* north and south, that is correct it crosses from one side to the other.

Q. And at that point the main track of the Cincinnati Southern Railway leaves the right of way of the Western and Atlantic Railway, and is not along or upon its ancient or former right of way, or contiguous to it, is it?

A. I will answer that that is the way the passenger trains, and in

fact the other trains seem to go off of the right of way at that
98 point. Now, what is the main track or any other track I
would not say, but the trains in operating into this passenger station, for instance, leave the Western and Atlantic right of way at the interlocking tower going on towards the depot.

Q. Well then, what track is it that you claim is on the ancient or former right of way to the Western and Atlantic Railway from that point at the interlocker towards Chattanooga?

A. It is a track of the Cincinnati Southern to the best of my knowledge and belief. What track it is I would not undertake to say.

Q. Where does it go to?

A. I just think it goes up through the space.

Q. What is it used for?

A. I don't know.

Q. Does it parallel the Western and Atlantic Railroad?

A. For part of the distance.

Q. When it leaves the interlocker, what course does this track take?

A. It takes a general parallel course with the Western and Atlantic Railroad.

Q. How far from the Western and Atlantic Railroad?

A. The number of feet is fourteen.

Q. Just a portion of the distance, isn't it?

A. Well, I could not say just at the moment, may be six or eight hundred feet. I don't know the exact distance.

Q. Did you go over this situation yourself?

A. Yes, sir, I walked over the ground. I didn't measure every one of these little variances.

Q. Well, they are not little variances, they are large vari-
99 ances, aren't they?

A. I would not consider them so.

Q. Isn't it a fact that this track now in question leaves the ancient right of way of the Western and Atlantic Railroad altogether for a considerable distance?

A. No, sir, if it does it does not show on the map.

Q. You did not measure it?

A. I did not measure it exactly on the ground at that point, no, sir, where it got actually on the actual feet.

Q. So, when you said in answer to my former question that this track for the 1750 feet was parallel to and fourteen feet distant from center to center from the Western and Atlantic track, you were in error, weren't you?

A. I don't think I said that.

Q. I so understood you.

A. No, sir, if you recall I said it did not parallel it.

Q. Now, you spoke of the topography of the land from Boyce station to Chattanooga as being "rolling" would it not be more proper to describe this situation by saying that this right of way follows the bottom land of the Tennessee river at that point?

A. No, sir, not my understanding of what are the bottom lands of the Tennessee River.

Q. This is in the Tennessee bottom, is it not?

A. Partly so, yes.

Q. Well, beginning a short distance south of Boyce Station and running thence to the interlocker, that is all in *in* the Tennessee River bottom, isn't it?

100 A. I will have to ask you to define what is bottom land.

Q. I refer to the land which is overflowed by the Tennessee River at its freshets?

A. Then I will say that all that of that land is not subject to overflow.

Q. The greater portion of it, however, was subject to overflow?

A. Portion of it was subject to overflow.

Q. And a greater portion?

A. I don't know that. I was up there about this coming March a year ago, and I saw some of it that had not been overflowed.

Q. Did you ever visit it during the recent high water?

A. March 1917.

Q. During the high water of this year, 1918, did you visit it?

A. No, sir.

Q. You did not see it in the high water of 1913?

A. No sir. Was the high water of 1918 and 1913 any higher than 1917?

Q. I am unable to state. Now the general construction from Boyce Station towards Chattanooga, generally speaking, is upon a fill, is it not?

A. May I refer to some memoranda that I made?

Q. Yes.

A. Well, my notes show a cut then a fill, then a cut, then a fill, then a cut, then a fill—it is just a series of cuts and fills, as I said a while ago.

Q. Yes, but the fills are much longer than the cuts, are
101 they not?

A. I will just read you some memoranda from the notes I have: Here is a cut, commencing at station 6997 plus 40, cut 1640 feet long, followed by a fill 930 feet, then a cut 180 feet long, and a fill 280 feet and a cut 480 feet and a fill of 290 feet, a cut of 280 feet and a fill of 320 feet, cut of 920 feet and a fill of 1740 feet, and then a fill of 400 feet and a fill of 3150 feet. The cuts are not quite so long as the fills, but if you will just run through those figures you will see there is not a very great difference between them. They are pretty evenly balanced.

Q. You have a fill of 1700 feet and then a cut of how much?

A. No, it starts out——

Q. I mean at the last there?

A. Here is a fill 1740 feet and one of 400 feet and a fill of 3150, that is about a mile.

Q. About a mile?

A. Yes.

Q. That is a fill where, towards the northerly or the southerly end of this track?

A. That is the northerly end.

Q. The northerly end?

A. Yes.

Q. Those figures concerning the cuts and fills which you just detailed began at which end, Chattanooga or Boyce?

A. At the Boyce end.

Q. At the Boyce end?

A. Not immediately at Boyce, it is the first cut towards Chattanooga from Boyce.

102 Q. How far from the Boyce end is the first cut? I refer to cuts that you have mentioned, now?

A. Yes, I understand. The first one is about 2000 feet.

Q. What is the character of that space of two thousand feet?

A. It is a fill. I just didn't happen to have that figured in here.

Q. Now, how much of a fill was there there, how high is that fill above the natural surface of the ground?

A. It will vary from about two feel in height to the deepest point about fourteen feet deep, I should say.

Q. And the place where the fill extends for a mile or more, how deep is that fill?

A. Well, it is about the same depth of fill.

Q. Aren't there some places in it where it is twenty-five or thirty feet in depth?

A. No sir, I do not recall a single one as much as thirty feet, or twenty-five. Possibly right over——

Q. Do you know where the culvert is, just north of the belt crossing?

A. Yes sir.

Q. How high is that fill?

A. It may be about twenty-five feet right over the culvert.

Q. Now these fills, this space which you have indicated as being occupied by fills, those spaces were subject to the overflow of the Tennessee River before the fills were put there, were they not?

A. Probably so.

103 Q. And when the Tennessee River reaches its freshet stages, its waters come up against those fills now, do they not?

A. Come up against and around it, yes.

Q. And how near to the top of it do they come?

A. Why in some places they have been over the track.

Q. All the way are these two railroads, the Western and Atlantic and the Cincinnati Southern Railway, maintained at about the same grade?

A. They appear to be the same grade practically the whole distance.

Q. Now, how often have you observed these flood waters of the Tennessee River at that point?

A. I never had but one opportunity.

Q. And that was in the year 1917?

A. March 1917.

Q. Do you say that at no time does the Tennessee River wash these banks?

A. No.

Q. You did not make that assertion?

A. No, I do not.

Q. Now, do you say that the location of the Cincinnati Southern Railway fills and embankment, adjacent to and on the Tennessee River side of the Western and Atlantic Railroad, today offers the latter no protestion from that water?

A. I say that it does not make any material difference.

Q. If the Western and Atlantic road bed were e posed to the floods, and the floods had a tendency to wash the banks, the embankment would have a tendency to cave, would it not?

104 A. You will have to state your question a little differently. I do not agree to the statement of the question.

Q. Assuming that there is a wash, that there is a current in the movement of the water of the Tennessee River when it gets high at times, would that not wash any railroad embankment it came against?

Mr. Wimbish: I object to that as purely hypothetical and immaterial in this case.

A. I can't answer that question the way it is stated.

Q. Don't you know whether a railroad embankment is washed by a current or a flood that has a current in it?

A. Yes.

Q. Well, is it?

A. Yes. I will also state through that the water being on both sides of the embankment, there is not any action of the current, waves against it.

Q. However, the Tennessee River is to the west of these two tracks, isn't it?

A. But these tracks do not constitute a dam.

Q. That is correct, isn't it?

A. Yes.

Q. And the Cincinnati Southern Railroad is on the Tennessee River side of the situation, isn't it?

A. At that point, yes.

Q. Well, it is all the way from Boyce to Chattanooga, isn't it,—from Boyce to the Interlocker?

A. From Boyce to the Interlocking Tower, yes.

105 Q. If there is any wash from the Tennessee river, it comes against the Cincinnati Southern Railroad doesn't it?

A. I don't know that to be a fact.

Q. If there is any wash?

A. No, sir, I do not answer that question yet.

Q. Do you know the effect of water, of a wet condition upon a railroad embankment?

A. I do.

Q. It is something to be avoided so far as possible is it not?

A. Yes, sir.

Q. You put culverts under railroad embankments to drain them, don't you?

A. Yes.

Q. And you very often drain them with what is called farm or French tile, do you not?

A. Not embankments, no.

Q. Well, you drain the railroad right of way, to get the water away from the track?

A. Yes.

Q. Why do you want to get the water away from a railroad track?

A. In order to maintain a stable road bed.

Q. And will it affect the stability of the road bed if there is water along the road bed?

A. Yes.

Q. Does it sink?

A. An embankment that is surrounded by water on both sides won't slide or sink either.

Q. If it is on one side what will it do?

A. That condition does not prevail there. I said a while
106 ago that your embankment does not act as a dam.

Q. You mean that the water gets on the other side of the embankment?

A. That is the way I have seen it.

Q. Therefore the water contracts the Western and Atlantic Railroad upon the eastern side of the road?

A. It rises,—I won't agree to the word, "Contracts", it rises on both sides.

Q. But it does not get against the road bed of the Western and Atlantic on the west, because it is protected by the Cincinnati Southern?

A. It does not strike the Western and Atlantic road bed because the embankment of the Cincinnati Southern is on that side between it and the Western and Atlantic embankment.

Q. You will certainly admit that it is desirable to keep a road bed or fill as dry as possible, is it not?

A. Yes.

Q. And anything that tends to keep it dry is beneficial to it, isn't it?

A. Yes, if you could get it up above the high water line it would be very desirable.

Q. And if the Cincinnati Southern Railway maintains an embankment against the Western and Atlantic Railroad twenty-three and one half feet wide or more on its western side and between it and the waters of the Tennessee River, it is beneficial to the road bed of the Western and Atlantic Railroad, is it not?

A. It might just be for that particular thing, but the advantage is more than offset.

Q. But not as to the water?

107 A. Well, I will agree to this, that the water will probably not seep through the twenty-three and a half foot embankment and reach the Western and Atlantic road bed, yes.

Q. Precisely, so on one side of your Western and Atlantic road you have a dry road bed as the result of the Cincinnati Southern embankment there, haven't you?

A. No it is not dry because the water is all around it and water is on top of it.

Q. Well you have got something that keeps water off of it from that side?

A. Yes certainly. That is a physical fact.

Q. The water does not get over it at all freshets does it, it is only occasionally that the water gets over it?

A. Yes, to the best of my knowledge and belief. I have not seen them all.

Q. Of course you were not familiar with this general situation from your own observation prior to the building of the Cincinnati Southern Railroad?

A. No, sir, I do not go back quite that far.

Q. How wide is the Cincinnati Southern Railway's embankment, not embracing that part under the Western and Atlantic,—how much did the Cincinnati Southern build there, assuming that the Western and Atlantic built only what was necessary for the maintenance of its single tracked railway, according to the usual practice?

A. The practices of the Western and Atlantic Railway was to build an unusually wide road bed. Very much of the right of way of the line of the Western and Atlantic road was graded for a double track road at the time.

108 Q. Assuming for the present that this was built as a single track railroad, or say a single track road from Boyce to Chattanooga, the point in question, how much additional fill did the Cincinnati Southern Railway put between it and the Tennessee River?

A. Probably I presume the twenty-eight feet wide and varying height.

Q. That would be twenty-eight feet measured horizontally from any point in the fill of the Cincinnati Southern to the fill in the Western and Atlantic, whether at the bottom or top?

A. Yes sir.

Q. Where are those yard tracks that you spoke of, belonging to the Cincinnati Southern, or its lessee?

A. Why they are at the same level as this embankment, or practically so. The tracks seem to be at a uniform elevation.

Q. Where abouts are they?

A .They commence at the Belt Railroad crossing, at Citico Junction rather and from there on to Chattanooga.

Q. How far is that from ,Boyce?

A. It is a little over two miles—in round numbers two miles.

Q. Now, are those yard tracks built on the fill that you spoke of?

A. I won't answer that question because I did not investigate that feature.

Q. Well, the figures that you have just given us indicate that at the Belt Line there is a fill approximately twenty-five feet, and if the yards extend thence southwardly they must be placed upon the fill, must they not?

109 A. I did not look into that feature, and I would not like to undertake to answer yes or no.

Q. What kind of tracks are those, what are they designed for?

A. I stated that they were yard tracks, there seems to be a yard there.

Q. They are designed for use in conjunction with the main line track of the Southern Railway, are they not?

A. I could not answer that question because I am not familiar with the operation of the lines in Chattanooga, the Southern Railway lines. I know that the Southern Railway comes in there about at Citio Junction and that the Cincinnati Southern is there also, but as to the method of operation I cannot say.

Q. Well, now if these yard tracks are designed in connection with the main line track of the Cincinnati Southern Railway, that is the C. N. O. & T. P.——

A. They have connections with the C. N. O. & T. P. and the Cincinnati Southern tracks.

Q. They are laid out with grades that the railroad plan and the plan of the yards, all of it would depend upon the main line?

A. Yes sir.

Q. And those tracks have the elevation of the Cincinnati Southern Railway?

A. Yes sir.

Q. And they are built upon this embankment, or however it may be, to the west of the main line?

A. Yes sir.

Q. Now, as you approach Chattanooga, what obstructions, in the right of way of viaducts, are there across this right of way occupied by the Cincinnati Southern Railway?

110 A. The first is at Riverside Drive overhead bridge, the next is the Atlanta Division, I presume you call it the Atlanta Division of the Southern Railway, or *it* that called the Knoxville Division? It is the Southern Railway anyhow. The next is the McCallie Avenue viaduct, and then the East End Avenue Viaduct.

Q. The Riverside viaduct is built of what?

A. Concrete.

Q. Concrete arches.

A. Concrete arches and I think there are some slabs there.

Q. The supports of the bridge rest upon this land, the original right of way of the Western and Atlantic Railroad, and whatever rights of way the Southern Railway and the Cincinnati Southern Railway have acquired there, do they not?

A. Yes.

Q. And what is the McCallie Avenue viaduct?

A. That is concrete arches and plain slabs.

Q. And the same situation obtains there?

A. Yes, sir.

Q. And the East End Avenue the same thing and the Southern Railway, what sort of a bridge is that?

A. That is a girder bridge, with beams and piers.

Q. And they rest upon the same land beneath?

A. Yes.

Q. Now isn't it a fact that all of these,—with each of these viaducts and approaches would offer obstructions to the movement of the track of the Cincinnati Southern Railway?

A. I did not design the yards of the Cincinnati Southern and I
do not know what they planned in advance, looking to future
111 extensions. I cannot answer that question.

Q. You know there are but a limited number of available spaces which the railroad tracks can be built under each one of those bridges, do you not?

A. Yes, sir.

Q. And you know that each and every one of those available spaces is now occupied by a railroad track, do you not?

A. No, sir, I don't know that.

Q. Do you know and do you say that is not so?

A. I say I don't know whether that is a fact or not. I am not acquainted with their use or non-use.

Q. At any rate you know, do you not, that all those to the west of the Cincinnati Southern Railway are occupied?

A. I do not.

Q. Well, before giving your answer that the Cincinnati Southern track could be moved, did you not investigate the existing conditions underneath these viaducts or bridges?

A. Yes sir.

Q. Don't you know that they are now all occupied by railroads?

A. That still does not alter the fact that they could be moved.

Q. Well, didn't you take into consideration, in considering the ease with which they could be moves, what was there?

A. Ease is a relative term. There is no insuperable obstacle to moving them.

Q. But the difficulty of moving the tracks depends upon what is there now and whether there is a space that they could get there,
and the difficulty of using that space, does it not?

112 A. No, sir.

Q. What does it depend on?

A. It is a question just of cost.

Q. You do not undertake to say how it would interfere with the yards of the Cincinnati Southern Railway at Chattanooga if this main line were moved westward over on the westerly intervening space under the viaducts?

A. No, sir.

Q. You have not studied that?

A. I did not—the details of it.

Q. Well, it is a very serious detail, isn't it?

A. Yes, of course it is.

Q. So that when you gave your former answer that the Cincinnati

Southern Railway could be moved westwardly, I understand you merely meant to say that that was a physical possibility?

A. Yes, sir.

Q. And you gave that answer regardless of the question of cost, did you not?

A. Yes.

Q. And inconvenience to other yards?

A. Yes, I simply said it was a physical thing that it could be done.

Q. You mean that you can put a railroad anywhere if you spend money enough?

A. I have seen them built under most disadvantageous conditions.

Mr. Peck: I think that is all, Mr. Wimbish.

113 HUNTER McDONALD, a witness called on behalf of the complainant, having been first duly sworn by the Examiner, testifies as follows:

Direct examination.

By Mr. Wimbish:

Q. Please give your residence?

A. Nashville, Tennessee.

Q. And your profession?

A. Engineer—Chief Engineer of the Nashville, Chattanooga and St. Louis Railway Company.

Q. How long have you been connected with the Nashville, Chattanooga and St. Louis Railway?

A. Since December 18th, 1879. I began as assistant Enigneer and have held positions of Resident Engineer, and I have been Chief Engineer since November 1892. Prior to that time I was—For two years I was resident Engineer of the Western and Atlantic Railroad, having my headquarters in Atlanta, came here in February 1891.

Q. The Nashville, Chattanooga and St. Louis Railway Company, is the lessee of the Western and Atlantic Railroad?

A. Yes, sir.

Q. When did that lease begin?

A. December 27th, 1890, I think is the date.

Q. What was your connection with the Western and Atlantic Railroad? And your knowledge of its condition and affairs since that time up to the present?

A. I have been in charge of the maintenance of way of the Western and Atlantic Railroad since February 1891, and my knowledge
of that portion between Boyce Station and Chattanooga dates
114 back to the time of the construction of the Cincinnati Southern
when they were building yards in Chattanooga in 1879.

Q. Will you describe the location of the tracks of the Cincinnati Southern Railway on the right of way of the Western and Atlantic Railroad between Boyce and Chattanooga?

A. The present location at Boyce, there is a depot between the single main line track of the Western and Atlantic and the double main lines of the Cincinnati, New Orleans and Texas Pacific. Coming towards Chattanooga the tracks converge and come together within fourteen feet of the centers of the nearest tracks, I should say, about two or three hundred yards south by the compass of the depot at Boyce. From there on the tracks of the Cincinnati Southern are a double track, the nearest one to the Western and Atlantic being about fourteen feet from center to center, the outside one, I think, thirteen feet from the first named.

Q. Are both those tracks on the right of way of the Western and Atlantic Railway?

Mr. Peck: We object to the question as an assumption, on the ground that the question assumes it is the right of way of the Western and Atlantic.

A. Both of those tracks are on the right of way of the Western and Atlantic Railroad. About two miles from the first point described, the tracks pass under a recently constructed, reinforced concrete viaduct on the Riverside Drive. A short distance south of this bridge is the crossing of the Southern Railway which is a through plate girder.

Q. When you say "south" do you meen toward Chattanooga?

A. I mean by the compass and towards Chattanooga. I
115 think the bearing on the tangent at that point is nearly north 30 degrees east, and we are therefore, travelling south 30 degrees west according to my description. After passing under this through plate girder you come to the tower interlocking plant, or called Citico Tower. From there on the two tracks of the Cincinnati Southern continue on the right of way to East End Avenue crossing which is just south of the East End Avenue viaduct and beginning at the Citico Tower the tracks of the Cincinnati Southern branch out into a yard of varying widths and number of tracks, I am not prepared to say how many, but it has multiple tracks, the tracks continuing more or less parallel with each other with various widths up to the East End viaduct and a number of them pass under the East End Avenue viaduct. The tracks that primarily constituted the Cincinnati Southern south of the East End Avenue tower are no longer used as running tracks, and I think only one of them—one of them is not now on the right of way of Western and Atlantic. At the end of this—Well I will go back and give a little history. At a point twelve hundred feet south of the East End Avenue tower the original main line of the Cincinnati Southern crossed the track of the Western and Atlantic with a single track crossing. The two tracks of the Cincinnati Southern converge just north of the crossing. After crossing at what was known then as the old Target switch the tracks fanned out again until they got northward a distance of about seventeen hundred feet and one of them on the right of way of the Western and Atlantic for most of the distance and two of them of it for a part of it. The viaduct at McCallie Avenue is of reinforced concrete, the pier which supports the spans adjacent to the rights of way of the two roads stands on the present dividing line.

116 The same is true at East End Avenue, and I think the same is true at the Riverside viaduct. At the plate girder bridge there is a through span I think I have completed the answer.

Q. What have you to say concerning the topography and physical features of this right of way between Boyce and Chattanooga?

A. Here is a blue print of the records of my office, made under the direction of the United States Government, for the purposes of valuation. From my recollection and from an examination of this blue print, I will say that the preponderance of the railroad between Boyce and the southmost point where the tracks of the Cincinnati Southern road occupy the right of way of the Western and Atlantic, is on a fill. There are a number of cuts. The highest fill is near mile post 134 from Atlanta, which is twenty-eight feet exclusive of the bottom of the culvert, the culvert occupying the ditch for a distance of five feet deeper than that, making a total height from the bottom of the culvert to base of rail of about thirty-three feet. There is another embankment about twenty-three feet high, and the rest of the embankments will average about seven feet, I should judge by an inspection of this profile and from my recollection. There are, however, cuts where they run as high as twenty feet.

Q. What is your knowledge and information about the several periods of high water or the freshet stages of the Tennessee River at this point, within the past forty years?

A. As stated before, my personal knowledge does not go back beyond 1879. I have been over the track between Boyce and Chattanooga on several occasions when the water was over the rail.

117 Q. Mr. McDonald, do the records show previous stages of high water or freshet?

A. The records show that in 1867, 1875, and 1886, the water has been over the track. I am not positive of those. It may have been over the track—no,—It was over the track in 1917, March, 1917. Those are the only records that I now recall when the water has been over the track for any great distance.

Q. Now, Mr. McDonald, what is the character of the overflow with respect to being back water or water with a current?

A. The tracks are located quite a distance from the river, I think it varied from three quarters to probably a mile and a quarter and the water on both sides, while it is rising and while it is over the tracks, is ordinary back water. I passed over this road on the pilot of an engine in March, 1917, when the water was up above the ax*el* of our pony truck in passing under the bridge of the Southern Railway and over the tracks in several other places. It was absolutely still, unless it might be that the wind was blowing and making waves. The water rose considerably higher than that after I passed over it.

Q. Mr. McDonald, from your knowledge of the conditions attending the freshets or periods of high water, and the high water of 1886, please state what, if any, damage was done to road bed and the embankment of either the Western and Atlantic Railroad or the Cincinnati Southern Railway, because of such floods?

A. At that freshet and during the freshet of March 1917, and all

other freshets that I have encountered in that neighbor-
118 hood,—I have had the water up around our trucks at Grays-
ville, which is a point considerably north, by the compass
and south by our time card direction, and I have never observed that the old embankments of the road, which have in a sense become compacted by the floods which have run around them, have ever been injured at all. A new embankment built and surrounded by water will, of course settle.

Q. These parts, Mr. McDonald,——?

A. Wait, excuse me a moment. If it is made of clay why there is a possibility of its sluffing, but when the road bed has once become stable through time, it takes a good deal, especially when it has a growth of grass and stuff over the outside, it takes a considerable amount of current to erode it.

Q. No, Mr. McDonald, from your knowledge and observation of this road bed and its embankments, at or near the point in question, and from your experience and knowledge as an engineer, would you say that the floods in the Tennessee River in 1879, or for a period preceding that time, say five years or ten years, would have caused any appreciable or material damage to the road bed of the Western and Atlantic Railroad?

A. No, they had sufficiently settled by that time to be free from any action that might be brought by the current of the rise at those points.

Q. Do you know when the Western and Atlantic Railroad was built at this point, along between Boyce and Chattanooga,—Of course you don't know of your own knowledge but the record shows?

A. I think it was about 1848 to 1850.

Q. Did the construction of the Cincinnati Southern follow-
119 ing the privilege granted in the Act of 1879, afford any pro-
tection, add any additional protection to the embankment
and road bed of the Western and Atlantic Railroad against damage from high water, if so what protection, and if not, why not?

Mr. Peck: We object to that as incompetent and immaterial.

A. I do not see that it was any, for the reason that none was necessary. The embankments were well all covered with growth and were well packed by time. There wasn't sufficient current to erode it.

Q. Well, *has* the Cincinnati Southern Railroad been constructed on the adjacent right of way, what effect would that have had in protecting the embankment and road bed of the Western and Atlantic Railroad from high*t* water or floods in the Tennessee River?

A. I don't think it would have protected it from high water of the Tennessee River in any sense, for the reason that no protection was necessary.

Q. No, was it of any benefit at all to the Western and Atlantic Railroad against high water?

Mr. Peck: We object to the question, *is* incompetent and irrelevant.

A. None.

Q. Would it have affected the proposition either way?

Mr. Peck: We object as incompetent and irrelevant.

A. What do you mean by either way?

Q. I mean would the construction adjacent on its own right of way have increased the liability of the Western and Atlantic Railroad road bed to damage or would it have decreased it or would it have affected it in any way?

120 Mr. Peck: The same objection.

A. I- would not have affected it in either way, and my answer to that is based on my knowledge as an observer of the embankment of the Western and Atlantic Railroad in the same neighborhood, where practically the same conditions occur and it has only a single track.

Q. What, if any, was the benefit to the Cincinnati Southern Railway in putting, being permitted to built on the right of way of the Western and Atlantic?

Mr. Peck: We object to the question as irrelevant and immaterial.

A. The Cincinnati Southern Railway saved in the heading angles about from one half to two thirds by reason of the fact that the embankment, the well packed embankment, I will say, of the Western Atlantic Railway was in existence and by reason of the fact of the culverts under the Western and Atlantic Railway required only a short extension whereas if they had been building a new line they would have had to be very much longer. The grading necessary for the Cincinnati Southern to do to the embankment of the Western and Atlantic Railroad, in order to secure a road bed adjacent to it constituted a trapezoid about thirteen feet in width at the top and base on embankments and also in cuts and of the depth of the embankment or cut.

Q. Was this construction of the Cincinnati Southern Railway in the manner that it was constructed, on the right of way of the Western and Atlantic Railroad, an advantage or a disadvantage to the Western and Atlantic Railroad?

Mr. Peck: We object as irrelevant, incompetent and immaterial.

121 A. From an operating standpoint, a very great disadvantage.

Q. What is the disadvantage?

Mr. Peck: We object on the same grounds.

A. The disadvantages are the confining of the operations of maintenance such as putting in cross ties practically to one side of the track. The men in maintaining the road bed, putting in ties, getting out of the way of trains, have to look out for the trains of the Cincinnati Southern on their track. It is much safer, on account of these trains adjacent to our track for them to confine their operations to the opposite side and it is more expensive. The presence of the embankment and bal-ast of the Cincinnati Southern Road on one side necessitates the drainage of our track entirely on the other side to prevent the water from running water on both sides thereof, drying out thr road bed the quicker.

Q. Well, what benefit or value, if any, has accrued to the Western and Atlantic Railroad by reason of the construction of the Cincinnati Southern Railway on the right of way in question?

Mr. Peck: We object as irrelevant, incompetent, and immaterial.

A. None.

Q. You have stated what information you have as to the number of tracks of the Western and Atlantic and the Cincinnati Southern respectively there are on this right of way, have you not?

A. I think I stated that clearly enough.

Q. Do you know whether the Cincinnati Southern has a right of way immediately outside of that of the Western and Atlantic Railroad sufficient to accommodate its needs and traffic into and
122 out of Chattanooga?

Mr. Peck: Objected to as incompetent, irrelevant and immaterial.

A. The Cincinnati Southern and the C. N. O. & T. P. Railway have acquired additional land between Boyce and Chattanooga of widths varying from about one hundred feet to some three or four hundred feet, I don't know the widths.

Q. Well, you have stated the locations of the bridges and viaducts over the tracks of the Western and Atlantic Railroad and the Cincinnati Southern between Boyce and the Point in Chattanooga where the Cincinnati Southern leaves the right of way of the Western and Atlantic I believe?

A. Yes sir.

Q. What, if any, tracks has the Cincinnati Southern of its own on its own right of way under the bridge at Riverside Drive and under the other bridges and viaducts that you have referred to?

A. The two tracks of the Cincinnati Southern which pass under the Riverside Drive bridge are on the right of way of the Western and Atlantic Railroad. The same is true regarding those under the Southern Railway plate girder. At McCallie Avenue, two of the tracks which pass under the viaduct are on the right of way of the Western and Atlantic Railroad and when I say the right of way, I mean the original right of way which was deeded to the Western and Atlantic Railway.

Q. I think we all understand that.

A. At East End Avenue I think that the two tracks there are on the right of way. Any way one is and a part of another one. There are other openings in all three of the concrete viaducts to which their tracks do and can pass. The Southern Railway Bridge has no opening except the long span under which three tracks go with
123 room for a fourth track for the Western and Atlantic, on the west side.

Q. Now, what changes would be required in either of these bridges or viaducts in order that the Cincinnati Southern Railway might have a passage for its own tracks on its own right of way along that side?

Mr. Peck: Objected to as incompetent, irrelevant and immaterial.

A. The only change under any viaduct would be in that of the plate girder Southern Railway Crossing. That is the only change necessary to allow two tracks to pass under. Just as to what inconvenience it would put the Cincinnati Southern to give up the two tracks adjacent to the Western and Atlantic and pass their tracks through the oepnings of the Riverside Drive and convert the tracks which pass under McCallie Avenue and East End Avenue into main lines, I am not able to say, it is not a physical impossibility.

Q. What is the need present and prospective for the use of the entire right of way of the Western and Atlantic Railroad from Boyce to Chattanooga for the free and convenient operation of trains and the conduct of the railroad business of the Western and Atlantic Railroad?

Mr. Peck: Objected to as immaterial, incompetent and irrelevant.

A. The Western and Atlantic Railroad of itself has very inadequate terminals at Chattanooga and without the facilities which are afforded by the N. C. and St. L. Railway, it would now be almost impossible to operate it successfully unless it had a right of way—unless it had the full use of the right of way which was originally granted it. That would not be enough to enable it to carry on its business with the facility that the public expects.

124 Q. What was the relative need for the use of all this right of way on October 8th, 1879?

Mr. Peck: Objected to as irrelevant, incompetent and immaterial.

A. The relative need then was not so great as now on account of the increase of the traffic and the units of traffic, making longer trains. In those days they were able to get along with much less space than they need now.

Q. Is there any physical evidence and if so what, that the Cincinnati Southern Railway was originally intended to be directly connected with the Western and Atlantic Railroad near Boyce Station so as to become a through line between Cincinnati and Atlanta?

Mr. Peck: Objected to as incompetent, immaterial and irrelevant.

A. The present Boyce Station is not the same as the Boyce station that originally existed on the Western and Atlantic Railroad. Boyce station formerly was what is now Kings bridge, which is the first station south by railroad parlance and north by the compass from the present Boyce Station. Between Kings bridge and Boyce Station as they now exist, there was graded at the time the Cincinnati Southern was being built a wye connection leading out from the tracks of the Cincinnati Southern south of their bridge over the Tennessee River and adjoining the embankment of the Western and Atlantic

North or I will say south by the compass, of the Kings bridge siding. At this point the Cincinnati Southern acquired considerable property and their right of way stakes are not ap-arent as marking the same.
These facts to me indicate that it was the intention at that
125 time to build a track over this embankment and to lay yards
on the grounds which were so acquired.

Mr. Peck: We move to strike out the latter part of the answer from the point where the witness says "These facts to me indicate" and following, as incompetent, irrelevant and immaterial.

Q. Well, for what purpose would they have desired to lay out and grade, as I understand you have testified, this physical connection between the Cincinnati Southern and the Western and Atlantic and the acquisition of property at this point adequate for yards?

Mr. Peck: Objected to as incompetent, irrelevant and immaterial.

A. The embankment which I have described was a railroad embankment, and of course I can only give my opinion and that is what I understand that you have asked for.
Q. Yes?
A. It is that it was built for the purpose of making a connecting track, and that the land was acquired for the purpose of building a yard up there to be used as an exchange yard.

Mr. Peck: We move to strike out the answer as a matter of surmise.

Q. Is there and has there been an exchange point at or near Boyce between the Cincinnati Southern and the Western and Atlantic?
A. There is now constructed at Boyce a yard which could be used as an exchange track but not frequently used, has been used to some extent.. The use, however, has diminished from year to year until
now I think it is almost nothing.
126 Q. To what extent is the Cincinnati Southern Railway
and its lessee, the Cincinnati, New Orleans and Texas Pacific Railway Company, in fact an important feeder to the Western and Atlantic Railroad?

Mr. Peck: We object to that as incompetent, irrelevant and immaterial.

A. It is not a feeder at all to the Western and Atlantic Railroad.
Q. To what extent is it a practical extension to the Western and Atlantic Railroad?

Mr. Peck: The same objection.

Q. To none as at present operated.
Q. Has it been at any time, and if so, when?
A. When I first came to the Western and Atlantic in 1891, we got some business from the Cincinnati Southern at Boyce, probably one or two train loads a day, but it has been a good many years since we had any exchange there at all that I know of.

Mr. Wimbish: The witness is with you.

Cross-examination.

By Mr. Peck:

Q. Mr. McDonald, in what connection did you become *connected* with the property in 1879?

A. Why, walking out over it and examining it while the work was going on. I was interested in new construction at that time, being a young man and just starting out in life.

Q. Were you employed by the Western and Atlantic Railroad?

A. No, I was employed by the Nashville, Chattanooga and St. Louis, whose terminus was in Chattanooga.

Q. When?

A. In 1879.

127 Q. In what capacity?

A. Assistant Engineer.

Q. What were your duties?

A. To examine and report on the tracks whenever requested to do so. I made no official visits to the Cincinnati Southern tracks, but I visited them being interested in the work.

Q. Was your work principally in the office?

A. No, my work was principally on the road. I was the only assistant on the system at that time, and I was kept pretty busy.

Q. You worked for the N. C. & St. L.?

A. You say do I now?

Q. Did you then?

A. Yes sir.

Q. I thought that the lease to the Nashville, Chattanooga and St. Louis Railway was dated December 21st, 1890?

A. You are correct, it was.

Q. Well, in 1879, was the Nashville, Chattanooga and St. Louis Railway interested in the property?

A. No, I was though. I was interested in it simply from a plain point of wanting to educate myself. I walked out and examined the road to the bridge out at the Tennessee River.

Q. Well, at that time, I mean, you were in what—in whose employ were you?

A. I was in the employ of the Nashville, Chattanooga and St. Louis Railway Company.

Q. You then had no business connection with this piece of railroad until along in 1890?

A. None whatever.

128 Q. That was when the Nashville, Chattanooga and St. Louis Railway Company began operating the property?

A. December 27th, 1890.

Q. Whatever observations you made prior to that time were casual and incidental?

A. Yes, as an interested spectator.

Q. Now, do you know whether the track of the Western and Atlantic Railroad Company was then located just where it is now?

A. At what point?

Q. From Boyce to Chattanooga? From Boyce to the present Interlocker?

A. Yes, it was located just where it is now, except that it has been shifted about eighteen inches at the McCallie viaduct.

Q. Otherwise it occupies just the same location?

A. Well, of course that *it* an inference on my part. It is where it was in 1891. I could not swear it had not been shifted prior to that time, between 1879 and 1891, but it being in a tangent from the semaphore near East End Avenue to Boyce and the tangent being straight, with the exception of the eighteen inches I have just described, it seems to me logical to assume it is right now where it was when originally built.

Q. The g*ua*ge was always the same as it is now?

A. No, the gauge was originally five feet. In 1886 the g*ua*ge was changed to four feet eight and a half inches.

Q. How was that change in g*ua*ge made, if you know?

A. One rail was slipped in, but I don't know which rail.

Q. In other words you cannot say whether that change
129 was made by slipping the western rail inward or the eastern
rail?

A. I do not know which was slipped, but it would not change the center line but one half of th-ee and one half inches, which is one and three-quarters *u*nches.

Q. If the western rail were moved, ordinarily it would change the location of that rail three and one-half inches?

A. Yes, sir, and the location of the center one and three-quarters inches.

Q. So you can't say within three and one half inches where the location of the westerly rail was in 1879?

A. No.

Q. You were not, of course, familiar with the mate*e*rial of which the fill was constructed from Boyce to Chattanooga, that construction being made before your time?

A. I was not familiar with it, but it was red clay I remember that very well and by an examination of the borrow pits and the cuts now you can tell pretty well what that was made out of.

Q. And generally stated it was red clay fill?

A. Yes, red clay fill and red clay cuts, is my recollection.

Q. Such a fill as that would be impervious to water, would it?

A. No fills that I know of are impervious to water.

Q. Is a red clay fill liable to slide when wet?

A. If it is fresh, yes, but not if it is well compacted and settled.

Q. Being well compacted and settled, suppose it becomes wet, it is not liable to slide?

130 A. It will slide if it is sufficiently wet, unquestionably.

Q. Now everything that tends to keep it dry would tend to keep it from sliding?

A. Yes.

Q. You spoke of the location of the track as it used to be from the point of the crossing of the Cincinnati Southern of the Western and Atlantic Railroad, and I believe you did not describe the present location of the track of the Cincinnati Southern from the point of crossing into the Chattanooga station, did you?

A. No, I did not.

Q. Well, do so.

A. The present location of the tracks is that there is a double track over—a double track crossing of the Cincinnati Southern tracks over the double tracks of the Western and Atlantic.

Q. Where?

A. Just south by the compass of the East End Avenue viaduct and opposite the new interlocking tower.

Q. Just a second there please. How far is that from the south terminus of the Western and Atlantic Railroad?

A. From the south terminus?

Q. I mean the south by the compass there?

A. Do you mean——?

Q. From the Chattanooga end of the Western and Atlantic Railroad?

A. The Chattanooga end of the Western and Atlantic Railroad is at 9th street, and the distance I should say is about a mile, as close as I can tell by recollection.

131 Q. Well, can you define this point a little more definitely, locate it on a map?

A. I was going on to describe it but you interrupted me.

Q. Well, pardon me.

A. The Western and Atlantic track has been double tracked under the East End Avenue viaduct and to a point just north of it by the compass. That work has been done within the past four or five years, and at the same time that the crossing I have just described was put in, in order to enable the Cincinnati Southern and Southern Railway to reach their new terminal station. From this point southward by the compass the tracks of the Cincinnati Southern, which, after they get over the crossing, are, I believe, the Chattanooga Terminal Company's tracks, diverge from the Western and Atlantic Railroad and leave it altogether for a distance of about twelve hundred feet, but in the process of fanning out for this terminal yard there are two tracks, which I have heretofore described, that are on the right of way of the Western and Atlantic Railroad, one of them alomst entirely and the other partially for a distance of about seventeen hundred feet. In other words, after the space of about twelve hundred feet southward by the compass from the interlocking tower, there is no obstruction on the west side in occupation of the right of way of the Western and Atlantic, on the west side, but after traversing the line for twelve hundred feet the occupation again begins and continues for seventeen hundred feet to a point where the Old East Tennessee, Virginia and Georgia Railroad crosses the tracks of the Western and Atlantic Railroad, south by the compass of the gas works. I will add that this track was the one by which the Southern Railway formerly reached the old central station, before the new terminal was built. 132

Q. Do you speak of the direction towards Chattanooga station as south from the Interlocker?

A. Yes sir.

Q. Proceeding southwardly from the Interlocker, this last named track diverges from the track of the Western Atlantic Railroad to what extent?

A. It goes beyond its right of way, I don't know how much further. I think probably it is seventy-five or eighty feet out to it, but then it begins to come back again,—not the main line, it is the yard tracks that come back.

Q. This yard track that comes back, you say it was about twelve hundred feet above it begins again upon what was the former right of way of the Western and Atlantic Railroad?

A. Yes, that is correct in round numbers.

Q. Then, how far is it from the Western and Atlantic Railroad?

A. About seventeen hundred feet.

Q. How far apart are the two tracks?

A. I do not know that I can answer that question now, because there may have been changes since the map which I have before me was made. I will answer your question and refer to our valuation maps that are the official record, but I can't give you the information correctly.

Q. How much right of way has the Western and Atlantic Railroad, if we take its original right of way as a basis, on the east side of its track in this space?

A. Thirty-three feet—what you mean by the east side?

Q. Well, we said we would speak of the Chattanooga direction as south, the station direction as south,—on the left hand side as you proceed towards Chattanooga.

A. Well, they have—I got my points mixed just now, I referred to that side as the west side back there.

133 Q. I thought you did.

A. I did and I was wrong. I want to correct that now. Then I will answer your question, thirty-three feet.

Q. From the center of the track?

A. Yes, sir.

Q. And how much would that be from the outside of the rail?

A. From the right side of the rail?

Q. Yes?

—. Thirty-feet, five and one quarter inches.

Q. Is that thirty-three feet center line from the east line to center line continued all the way out to Boyce Station?

A. It does. The original grants provided for thirty-three foot right of way, is my recollection, but there has been an adverse claim set up on account of the United States beginning at a point just south, by the compass, out the East End Avenue viaduct. They have claimed that our right of way there was only about twenty feet.

Q. With the exception of that, is it about thirty-three feet all the way out to Boyce Station from the center of your track to the east side of your old right of way?

A. I haven't with me the valuation map showing the Chattanooga

Terminals, but my recollection is that our grants originally granted through that entire territory thirty-three feet on each side.

Q. What I mean, I did not mean with reference to what the grants were, I mean the actual location of the road, is it thirty-three feet, the center line from the east side of the right of way?

A. Yes.

Q. All the way out to Boyce?

134 A. Yes, that is my recollection. It is of record in Chattanooga.

Q. Of course that would be subject to a little variation when this gauge was changed?

A. Yes.

Q. I believe you said that was in 1886?

A. Yes, in 1886. There would be a variation of one and three quarters inches on that account.

Q. Now, when the Tennessee river rises rapidly or falls rapidly after a freshet, you say there is no current?

A. No, I did not say that there is no current, but I said there is no current that would erode a well settled clay embankment.

Q. As a matter of fact, when the river falls rapidly there is apt to be considerable current, isn't there?

A. Yes, there is through the culverts, but not along the embankments.

Q. There are times when the back water goes off rapidly and times when it goes off slowly?

A. That is true through culverts. As the water rises the water passes through the culverts and rises quick on both sides of the embankment. That, of course, takes place quickly if the river rises rapidly, but the culverts are sufficient to pass it back and forth and there is ordinarily *is* not a very heavy current. If the river falls or rises rapidly the current through the culverts might cause some little whirl pools on each side, the rapidity of the rise or fall would govern the severity of these whirl pools. But the rapidity of the rise and fall does not have any effect on the sides of the embankment or would only affect them adjacent to the culverts.

135 Q. Now you have mentioned the times when the water has been over the tracks within your recollection, please state how often the river gets up to the foot of the embankment?

A. Oh, it gets up there very frequently.

Q. Every year?

A. Well, about every year, I would say sometimes twice a year.

Q. And how often does it get part of the way up the embankments?

A. Well, I should say it would be the same thing, some embankments along.

Q. And when the flood comes from up the river and rises part of the way upon the embankment, is that when you say there is no current in it?

A. I have never observed any to amount to anything.

Q. There is current in it, isn't there?

A. Oh, there is current, but not enough to erode the embankment that is well settled and protected by ordinary grass and vegetation.

Q. The wash of the river is occasioned by the point at which the flood occurs, whether it is up the river or down the river, principally, is it not?

A. I do not understand your question sir.

Q. Well, if there is a heavy rise from up the river there is a great deal more current that if the rise is principally from a heavy rise down the river is not that true?

A. A rise down the river would not have a current up the river to any extent.

Q. It would simply back the river up?

A. Yes.

Q. If there is a heavy rise up stream?

A. Then you would have the condition I have described
136 of a rapid rise when the rise reached the point in question.

Q. That is not unusual, is it?

A. Why, it is rather unusual in the Tennessee River for it to rise more than at the rate of an inch an hour. I have seen it rise that fast. The higher it rises the greater the water spreads over the eminances, and the back water, it takes it longer to spread as it gets higher in the gauge

Q. Now, prior to 1879, you were not, of course, familiar with the embankments?

A. No, sir.

Q. Nor with the rises of the river? Or experiences with reference to it?

A. I have no knowledge of the rises of the river except as stated by the history of it, which has been published by the Weather Observer at Chattanooga.

Q. That would simply give you the river stages in those years?

A. It gave me the months and days on which it reached the different gauge heights.

Q. Who was the Chief Engineer of the Western and Atlantic Railroad prior to the year 1879, up to that time?

A. Of the Western and Atlantic?

Q. Yes?

A. They did not have any. Mr. Martin Dooley was General Road Master and acted as chief engineer also, is my recollection of it. At one time I think Col. Grant, of Atlanta was Chief Engineer, but my understanding is that in 1879, it was Martin Dooley.

Q. What was Mr. Garnet's connection with the Western and Atlantic?

137 A. C. F. M. Garnett was, I think, one of the original locating engineers, and he probably remained with the line for some years, I don't know how long. But whether he was ever in charge of maintenance,—in 1879, I think it hardly possible.

Q. With their experience had been with reference to the wash and shifting of the banks by the freshets of the Tennessee River, you of course don't know?

A. I can imagine they were rather bad during construction, both for the Western and Atlantic and for the Cincinnati Southern all fresh embankments settle when water rises around them, but I do not know what their experience was as a matter of personal knowledge. I can only theorize on it from my own experience.

Q. Prior to 1879—you are speaking of 1879 and back?

A. Yes, I am speaking of my own experience prior to 1879?

Q. I understand, and you do not know, however, that they did not have trouble with their embankments and road bed at that point, due to the rise of the Tennessee River?

A. No, I do not.

Q. Now, when you testified that the Cincinnati Southern Railway simply had to add a trapezoid thirteen feet wide at the top of the fill, how wide do you assume that the previous fill of the Western and Atlantic Railroad had been at the top?

A. Well, I did not mean to confine the width of the trapezoid to thirteen feet. It would depend all together on the width and the height of the Western and Atlantic, but I assume that the
138 grade of the Western and Atlantic, by what I know of the
embankments now, in that neighborhood was about eighteen feet wide, and the addition of thirteen feet in a prism to an embankment eighteen feet wide, would give a width of twenty-two feet from the center line of the Western and Atlantic, which would be sufficient, to lay one more track on a fourteen feet and leave a berme of eight feet.

Q. As a matter of fact the Cincinnati Southern has two tracks, has it not?

A. Yes, my recollection is that the second track was added after the first one was built.

Q. Now, what is the width now, of the embankment at the top, can you tell us?

A. At what point?

Q. Between Boyce station and Chattanooga?

A. Why, it is very variable, as I have described before. It is the width for a double track from Boyce to Citico Tower, and from there flares out in a yard.

Q. The Cincinnati Southern has two tracks all the way?

A. Yes.

Q. At the narrowest point how wide is the top of the embankment?

A. It is about twenty-eight feet, probably thirty, from a point half way between the Western and Atlantic main line and the north bound main line of the Cincinnati Southern.

Q. I mean the entire top of the fill, how wide is it, all the way across?

A. I have just told you. If you want me to include the
139 top of the fill of the Western and Atlantic Railroad——

Q. The entire top?

A. Well, that would be about between thirty-eight and forty feet.

Q. Between thirty-eight and forty feet, now then, if we assume it was forty feet, if we also assume that the Western and Atlantic old fill was eighteen feet wide at the top, how much fill did the Cincinnati Southern add?

A. Twenty-two feet.

Q. It would also have the slope, have the same slope, same ratio and grade of slope that had previously been there, and would be twenty-two feet at the bottom, would it not?

A. Yes, if the two slopes were parallel, which is customary.

Q. The cross section of it would be a parallelogram twenty-two feet in horizontal width at all points?

A. Yes.

Q. Then you would be in error when you said it would be necessary to add a trapezoid thirteen feet wide at the top?

A. I was figuring for one track.

Q. You mean had they put in one track there?

A. They did put in one track first and then added another.

Q. When did they add the other track?

A. I don't know the date.

Q. It had been there for a long time, has it not?

A. Yes.

140 Q. How did that fill there for the Cincinnati Southern Railway twenty-two feet in width, compare in size with the original embankment which was there?

A. Well, it would hardly contain as much as the original embankment. It would depend a great deal on the height. I am not prepared to say just what the additional yardage would be. I can figure it up.

Q. Well, it would depend on the height of the embankment?

A. No.

Q. And the slope?

A. No, it would not even depend on that. I was mistaken there. The proportion of the fills would be uniform no matter what the embankment is. Of course the quantity would depend on the height of the embankment, that is what I have in mind, but as to the proportions of the relative yardage put in by the Western and Atlantic in its original construction and by the Cincinnati Southern in its subsequent construction for double track, then the quantity by the Western and Atlantic would be somewhat in excess of that put in by the Cincinnati Southern on an embankment.

Q. That would not be so if the embankment were but two feet in height, say, would it; a twenty-two foot fill, I mean a fill twenty-two feet wide would contain a great deal more earth than a fill eighteen feet wide at the top?

A. Well, your slopes have got to be considered there.

Q. Well, if you consider that?

A. How high you say the fill is?

Q. Two feet?

141 A. The fill of the Western and Atlantic would have twenty-four square feet in it, while that of the Cincinnati Southern would have twenty-two in its cross section.

Q. You cannot be mistaken about that? If it was twenty-two feet wide it would have more than forty-four?

A. I beg your pardon, twice twenty-two or forty-four. Wait a minute, let me fugure again. I failed to multiply by two in both cases. In the Western and Atlantic case you would have a cross section area of forty-two square feet, and in the Cincinnati Southern case you would have a cross section area of forty-four square feet.

Q. And the Cincinnati Southern cross section would be a parallelogram and not a trapezoid?

A. Yes.

Q. Now, of course you remember when these viaducts were built, by the City of Chattanooga w*h*ere they?

A. No.

Q. By whom were they built?

A. They were built, the Riverside viaduct was built by the Southern Railway—the Cincinnati Southern I believe it was. Of course I can't tell, they are so intermixed now. That part of it over the Cincinnati Southern Road was built by that company that part of it over the right of way of the Western and Atlantic Railroad, dividing it at a point half way between the tracks of the Western and Atlantic and the nearest track of the Cincinnati Southern, was built by the—was paid for or will be paid for I don't know whether it has been or not, by the N. C. and St. L. les-ee of the Western and Atlantic. The Bridge of the Southern Railway over the tracks of both companies was built by that company. The viaduct over the McCallie Avenue was built by the Cincinnati Southern Railway and the Nashville, Chattanooga and St. Louis Railway, lessee of the Western and Atlantic, the proportions being based upon the respective widths
142 of the right of way. Some portion of that expense was contributed by the City, for approaches. The approaches of the Riverside viaduct was built by the County. The East End Avenue viaduct, the propositions of the division have never been determined. The matter is still in controversy between the companies.

Q. On the Riverside viaduct and the McCallie Avenue viaduct, how did the proportion of the Western and Atlantic Railway, or its lessee, the Nashville, Chattanooga and St. Louis Railway compare with the Cincinnati Southern, the proportion of expense.

A. My recollection is that it was about one third at McCallie Avenue and East End Avenue, but at the Riverside Drive, I don't remember just what it was. The proportion of the Cincinnati Southern would be greater than that of the Western and Atlantic.

Q. Prior to the construction of these viaducts did the plans come before your engineering department?

A. They came before me, yes, sir.

Q. They were approved by you?

A. Yes.

Q. Did they go before the engineering department of the Cincinnati Southern Railway?

A. Yes.

Q. And i-s lessee, the Cincinnati, New Orleans and Texas Pacific?

A. Went before Mr. Daugherty, the Chief Engineer. They were prepared by the assistant engineer of the Southern Railway at Knoxville.

Q. And the abut*t*ments were so located by those plans as to afford facilities for the tracks of the Western and Atlantic Railway?

143 A. We had to *to* shift our tracks out of the way of them in order to allow for the clearance, the proper clearance between our tracks and the Cincinnati Southern at the viaduct.

Q. At which viaduct?

A. Both the east end and the McCallie Avenue.

Q. How about Riverside?

A. At the Riverside viaduct there is no intermediate support,—I think I am right about that.

Q. And in making those plans, the openings were so located that access was given for the main tracks of the Cincinnati Southern Railway?

A. Yes, sir.

Q. And the remainder of the openings, such as they were, west of there were used for the yard tracks of the Cincinnati Southern Railway weren't they?

A. Yes, they have been used, but there are still openings,—under the Riverside viaduct there are still spaces and also under the East End Avenue viaduct which are not occupied by tracks.

Q. Where are those spaces?

A. They are on the side of the tracks of the Cincinnati Southern, away from that of the Western and Atlantic.

Q. They are the western openings under the viaduct?

A. Yes.

Q. Where the headroom is smallest, are they not?

A. Yes.

Q. Do you know what the head room is, under the viaducts where *this* unoccupied openings occur?

144 A. At Riverside Drive, I think there are about twenty-one feet. At McCallie Avenue they taper off and vary down to height, probably, over the last track of the Cincinnati Southern yard, of I believe about seventeen and one half feet. And at East End Avenue they also taper down to probabl*t* the same elevation, I am not certain.

Q. Are there any unused spaces at the East End Avenue viaduct?

A. Yes, sir.

Q. How many?

A. I think there are three or four, I can't answer exactly.

Q. How about the openings under the Southern Railway bridge?

A. There is only one opening under the Southern Railway Bridge.

Q. That is now occupied by what?

A. By one track of the Western and Atlantic, two tracks of the Cincinnati Southern and one vacant space on the West side for the Western and Atlantic.

Q. West or east?

A. I want to explain there that the reason I am technical on that is that on our road, in railroad parlance, railroads going from Chattanooga to Boyce go south. On the Cincinnati Southern, in railroad parlance, trains going from Chattanooga to Boyce are *n*oing north.

Q. Let us assume that we are speaking by the compass?

A. I have been particular in every instance I could to specify that I was speaking by the compass.

Q. Now then, the space at the railroad bridge that has remained unoccupied is, by the compass, on the east side of the Western Atlantic Railroad?

145 A. Yes sir.

Q. And not available for the Cincinnati Southern Railway?

A. No.

Q. In order to get any other tracks for the Cincinnati Southern Railroad it would be necessary to rebuild or alter the construction of the bridge, would it not?

A. Yes, take down the abutment, build another concrete pier and put in another span, or as many other spans as you needed for additional tracks.

Q. When you speak of the head room at the east end and Riverside viaducts in the unused spaces, do you speak with reference to the grade to which the railroads are now brought?

A. Yes.

Q. Now, the division of the cost as to the Riverside and the McCallie Avenue viaducts, based upon the proportionate widths of the right of way occupied by the Western and Atlantic and the Cincinnati Southern Railroads, was it not?

A. What do you mean by occupied?

Q. Well, I mean that the Western and Atlantic Railroad based its proportion upon the right of way exclusive of the strip which it now claims in this law suit?

A. Yes.

Q. And the Cincinnati Southern Railway paid on the basis of the strip of land which is not in controversy in this law suit?

A. Yes.

Q. Do you make the return for taxes in Tennessee of the Western and Atlantic Railroad right of way?

A. No, sir, it is made by the real estate agent, Mr. H. H. Terhune.

146 Q. It is made under your supervision and direction?

A. No, sir it is not.

Q. You are not his superior in that respect?

A. No, I was his superior up to two years ago, but he now reports directly to the President.

Q. Up to two years ago, was this return made under your supervision?

A. Yes, sir.

Q. Up to two years what width of right of way did you return for taxes referring to the Western and Atlantic Railroad between Boyce and Chattanooga?

A. I could not answer that from recollection, but I can supply the information for you, if you wish it.

Q. Yes, sir, I would like to have that supplied.

A. I will supply it.

Q. Now, the track between Boyce station and the interlocker, where the tracks diverge at Chattanooga, the track of the Cincinnati Southern Railroad is its main track, is it not, or they are the main tracks of the Cincinnati Southern Railroad?

A. Yes sir.

Q. That is the main line as differentiated from sidings?

A. Yes, the two tracks adjacent to the Western and Atlantic Railroad between and East End Avenue interlocking tower, where it crosses the Western and Atlantic, are the main tracks of the Cincinnati Southern.

Q. It is a fact that there is at the present time facility for the exchange of freight between the Western and Atlantic Railway and the Cincinnati Southern, is it not?

A. At Boyce?

147 Q. Either at Boyce or Chattanooga?

A. O, yes, at Chattanooga.

Q. There is a physical connection?

A. Yes, at both places.

Q. They do exchange freight?

A. Yes.

Q. Freight cars which come over the Cincinnati Southern and the Western and Atlantic, such freight cars are transferred?

A. If for local points betweeen Chattanooga and Atlanta, they are turned over to us there but business that is not for local points is handled from Chattanooga southward over its own tracks.

Q. There are between Atlanta and Chattanooga what cities on the Western and Atlantic?

A. Well, I don't think there are any cities on there, as we rate cities. There is the Town of Dalton and Cartersville, and Marietta, those are the principal points, and there are villages all along.

Q. What about Rome?

A. Rome is eighteen miles from the Western and Atlantic Railroad. There are the villages of Ringgold, Adairsville, Kennesaw, Acworth, Smyrna, those are the principal ones.

Q. Freight destined for those points coming south by the Cincinnati Southern Railroad goes to the Western and Atlantic Railroad how?

A. Why, it is probably turned over to the Western and Atlantic at Chattanooga, and hauled southward from there.

Q. There is a physical connection, however, at Boyce, if it were desired to use it, is there not?

A. Yes.

148 Q. Now the Western and Atlantic Railroad, does it turn over freight to the Cincinnati Southern Railroad at Boyce?

A. No, no way to change there.

Q. Freight over the Western and Atlantic Railroad from Atlanta destined for point*ed* north, as Cincinnati, moves how?

A. It goes, usually goes by way of Nashville and Louisville.

Q. How does it go by Nashville?

A. Over the Nashville, Chattanooga and St. Louis Railroad.

Q. Its lessee?

A. Of the Western and Atlantic.

Q. Of the Western and Atlantic Railroad. In other words, it is not customary for the Western and Atlantic Railroad to route its

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freight for points in Cincinnati and north over the Cincinnati Southern Railroad?

A. No, not unless the shipper so specifies.

Q. *Q*. Now, then, suppose it is specified by the shipper that freight should move over the Cincinnati Southern Railroad and over the Western and Atlantic Railroad to Atlanta, it goes that way doesn't it?

A. I think it usually does.

Q. And vice versa, if it is billed from Atlanta for Cincinnati over the Western and Atlantic and the Cincinnati Southern, it goes that way doesn't it?

A. Yes, I suppose it does.

Q. Are you equally sure about that?

A. Yes, I think I am. I am not a traffic man however, or transportation man, and I am not altogether familiar with the way
149 in which the freight is routed. That is a matter that should be drawn out of an operating official, traffic official.

Q. Do you know any thing about the exchange of passengers between the roads?

A. Yes, I have observed that there is some movement of passengers at Boyce that stop off there, and I think there is a little movement of through passengers. However——

Q. There is a transfer of passengers at Boyce Station?

A. Yes.

Q. Especially for local points on the Western and Atlantic Railroad?

A. Local points on both roads.

Q. Both roads?

A. Yes, sir.

Q. Both going north and coming south?

A. Yes, sir.

Q. Then it is in a sense true that each road feeds the other to a certain extent?

A. If you call it feeding. I should think it would be starvation feeding though.

Q. Well, so far as it goes it is feeding to that extend, isn't it?

A. Yes, it is about the kind of feeding the Russian prisoners are getting right now.

Q. Freight delivered to the Western and Atlantic Railroad at Atlanta unrouted and destined for Cincinnati, what route would that take?

A. Nashville, Chattanooga and St. Louis, over the L. and N.

150 Q. Is that the long or short line?

A. I reckon it is the long line.

Q. Now, you stated that the present Boyce station was not the same as the ancient Boyce station, which I believe you said was formerly at Kings Bridge?

A. Near Kings Bridge.

Q. When was that change made?

A. I could not answer that.

Q. How long has Boyce station been where it is?

A. Ever since I have known it personally.

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Q. Was it there in 1879?

A. I could not answer that.

Q. Was it there in 1881?

A. Yes.

Q. Was it there in 1880?

A. I believe it was, but I could not say for certain. My information regarding the old Boyce Station is hear-say. I do not know that personally.

Q. Were you familiar with the lease from the State of Georgia, the N. C. & St. L. lease of 1890?

A. Fairly so.

Mr. Wimbish: I object to that because you can put in the lease if you desire, and that is certainly the highest and best evidence.

Q. Well, what did it cover from Boyce Station to Chattanooga by the lease?

A. I do not know whether there was any exception taken to the fact that the road was on the right of way or not, but I believe that track with other encroachments on the right of way were matters of knowledge to the lessee, at lease. We knew it was there.

151 Q. Prior to 1915, who was the engineer of the Railroad Commission of the State of Georgia or of the State of Georgia in its relation to the Western and Atlantic?

A. Prior to when?

Q. Prior to the time Mr. Johnston became the engineer?

A. They have had no engineer in the capacity in which Mr. Johnston has been serving since my connection with it in 1891.

Q. Well, their general and supervising engineer or consulting engineer?

A. They occasionally employed engineers for a short while, at one time they employed Mr. D. Lee Wardroper, to make what they termed an official survey of the Western and Atlantic Railroad.

Q. When the matters came up concerning the physical changes in the property, to whom were they submitted?

A. They were left to the lessee. Like most public property is, the property was left to take care of itself.

Q. Submitted to nobody at all?

A. None that I know of.

Q. Did they fall within your department?

A. Yes, the Western and Atlantic Railroad turned over to me, when I took charge of the office, one map of this property, and that was a map here in—of the terminals here in Atlanta. That is all the records that I know of, except the printed reports that were made by various investigating committees to the Georgia Legislature.

Mr. Peck: That is all.

Mr. Wimbish: Just a brief rebuttal.

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152 Redirect examination.

By Mr. Wimbish:

Q. Mr. McDonald, reference has been made — Mr. C. F. M. Garnett, as Chief Engineer of the Western and Atlantic Railroad. I want to ask you if he was Chief Engineer in the very early days of the construction of the road?

A. That is my recollection.

Q. Did you ever see Mr. Garnett?

A. I have his picture in my office. He was at one time Chief Engineer of the Nashville, Chattanooga and St. Louis Railway.

Q. That was a good many years before 1879, wasn't it?

A. Yes, sir.

Q. Speaking of the division of the costs for the construction of viaducts over the road, do I understand that in so far as the costs have been paid on viaducts that have been built, the Nashville, Chattanooga and St. Louis the lessee of the State, paid in proportion to the part of the right of way of the Western and Atlantic Railroad that used it?

A. Yes, all that we were given possession of.

Q. The Cincinnati Southern Railway Company, or its lessees, paid for the proportion that it used, under whatever privilege it may have acquired it?

A. Yes.

Q. Well, if you find that the taxes were given in that same way, is it based upon the same proposition that you paid taxes upon what you used?

Mr. Peck: We object to that as leading and incompetent, irrelevant and immaterial.

Mr. Wimbish: It is leading. I will withdraw the question.

153 Q. I will ask do you know upon what basis the taxes were paid?

A. I can't answer that question. I have made it a rule in returning our taxes to return a width which corresponds to our charter width, whether it was occupied by other persons or not, but whether that rule was followed on the Western and Atlantic Railroad in Tennessee or not I do not know.

Q. Now I understand you are going to furnish that information at request of counsel?

A. I am going to supply the information as to what width we paid on, but not in answer to the question you just asked.

Q. I understand, I was merely asking you to furnish that?

A. Yes.

Q. Well, in furnishing that will you furnish an answer to my question I have asked?

A. I will furnish a statement showing the width of right of way that we have paid for between Boyce Station and Chattanooga as lessee of the Western and Atlantic Railroad.

Q. I will ask you if the State of Georgia paid any portion of those taxes?

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A. No sir.

Q. That was an obligation of the lease, to be paid by the lessee?

A. Yes, sir.

Q. Do you know whether the Cincinnati, New Orleans and Texas Pacific Railway Company has been incorporated into and is now a part of the Southern Railway System?

154 Mr. Peck: Objected to. He don't know anything about that.

The Witness: I do know it.

Mr. Peck: Objected to as Incompetent and irrelevant.

Mr. Colston: It has not been incorporated in any such thing. If you want that information I will give it to you correctly.

A. Mr. Daugherty has charge of the Cincinnati New Orleans and Texas Pacific and is also Chief Engineer of Maintenance of Ways of lines west of the Southern Railway, which embraces a very large territory lying west of Charlotte.

Mr. Peck: We object to that answer and ask to have it stricken out as incompetent.

Q. Do you know whether the Southern Railway, in its folders, publishes its schedule, and in its official guide, incorporates the Cincinnati, New Orleans and Texas Pacific as a part of the Southern Railway System?

A. I do not know. I haven't studied those things. I know that I do have business with Mr. Daugherty.

Q. How do you do business with him?

Mr. Peck: Objected to as immaterial and irrelevant.

Mr. Colston: It is immaterial. We will give you exact information on that.

Mr. Wimbish: Then I will not push that inquiry any farther. I believe that is all.

Mr. Peck: That is all.

Thereupon the hearing was adjourned until 10:30 o'clock A. M., February 20th, 1918.

155 10:30 a. m.—Wednesday, February 20, 1918.

Pursuant to adjournment the hearing proceeded.

Before Edward L. Gilmore, Examiner.

Appearances: The same.

Charles E. Harman, a witness called on behalf of the complainant, having been first duly sworn by the examiner testifies as follows:

Direct examination.

By Mr. Wimbish:

Q. Please give your address and occupation?

A. Healy Building, Atlanta, Ga.

Q. What is your occupation?

A. I am General Passenger Agent of the Western and Atlantic Railroad.

Q. What do you mean by the Western and Atlantic Railroad?

A. The Western and Atlantic Railroad, you mean where it runs from and to?

Q. No, sir, I mean do you represent the lessee, the Nashville, Chattanooga and St. Louis as lessee?

A. Yes, sir.

Q. You have no connection with the State of Georgia, or the Western and Atlantic Railroad as such?

A. No, sir.

Q. How long have you been passenger agent in connection with the traffic of the Western and Atlantic?

156 A. Do you mean as General Passenger Agent?

Q. Well, any connection?

A. Well, I was first stationed at Cincinnati in connection with the Western and Atlantic Railroad as General Western Agent, and then I came back here and was made General Passenger Agent.

Q. What time?

A. I went to Cincinnati in 1885.

Q. Have you been passenger agent since 1885?

A. No, sir, I have been since 1890.

Q. That is under the present lease?

A. Yes, sir.

Q. When did you come back here from Cincinnati?

A. In 1890.

Q. Mr. Harman, will you state whether there is any exchange of passenger traffic, and if so what, as between the Western and Atlantic Railroad and the Cincinnati Southern Railway and its lessee, the Cincinnati, New Orleans and Texas Pacific, at Boyce Station, Georgia?

Mr. Peck: Objected to as immaterial, irrelevant and incompetent.

A. I think there is a little sir.

Q. Well, is there any?

A. Yes, there is some.

Q. What?

A. Well, some passengers get off there and make connections.

Q. I do not mean that, I mean is there any connection as between the roads.

Mr. Colston: You mean physical connection?

Mr. Wimbish: No, I mean exchange of passengers.

157 Q. Suppose a passenger is going from Atlanta to Cincinnati, how does his transportation read?

A. It reads Atlanta to Chattanooga and Chattanooga to Cincinnati.

Q. Have you any arrangement for transferring passengers to their tracks?

A. Yes, sir.

Q. What?

A. There is a station there.

Q. Is there any arrangement between the passenger departments?

A. No, sir.

Q. Are the schedules arranged so as to make it convenient for passengers to change at Boyce?

A. No, sir.

Q. As to passenger traffic, is the Cincinnati Southern a practical extension of the Western and Atlantic?

Mr. Peck: Objected to as immaterial and irrelevant.

A. I do not think so.

Mr. Wimbish: He is with you.

Cross-examination.

By Mr. Peck:

Q. Mr. Harman, what happened to bring you back from Cincinnati to Atlanta in May, 1890?

A. I was offered a position with the Central of Georgia Railway and this was my home and I accepted and came back, and after that I was made General Passenger Agent of the Western and Atlantic Railroad.

Q. How long after that?

A. I think a few months, I have forgotten how long.

Q. What happened when you were made General Passenger
158 Agent of the Western and Atlantic Railroad, was that at
the time it was leased by the Nashville, Chattanooga and St.
Louis?

A. I was made General Passenger Agent prior to the present lease a short while.

Q. At the time was there any exchange of passengers between the Cincinnati Southern and the Western and Atlantic railroads, more than there is now?

A. Yes, sir.

Q. At the time when passengers were going from Atlanta to Cincinnati by way of the line of the Western and Atlantic, how were they routed?

A. They were routed—you mean which way the tickets would read?

Q. Yes?

A. The tickets always read via Chattanooga.

Q. And from there north over what road?

A. The Cincinnati Southern.

Q. And at the time when a passenger left Cincinnati over the Cincinnati Southern for Atlanta, *Tennessee,* how were they routed?

A. They were routed the same way.

Q. Over the Western and Atlantic Railroad?

A. Yes.

Q. So that in 1890 the Western and Atlantic and the Cincinnati Southern Railway were in full co-operation in the exchange of passengers, is that not true?

A. Yes.

Q. When did that cease?

A. Well, I haven't got the exact figures about that, but soon after the present lessee took charge of the Western and At-
159 lantic.

Q. Lease to what?

A. To the Nashville, Chattanooga and St. Louis Railroad.

Q. That is this arrangement that was discontinued by the Western and Atlantic Railroad when it was leased to the Nashville, Chattanooga and St. Louis Railroad Company, is that not true?

A. I don't think that is true. That is all recorded in the President's office of the Nashville, Chattanooga and St. Louis Railroad at Nashville, as to how that was done. We had a through sleeping car line over the Cincinnati Southern Railway between Cincinnati and Jacksonville, Florida, prior to the present lease, and after the present lessee took charge of the Western and Atlantic Railroad, but how the discontinuance of that sleeping car through service occurred I do not exactly recall, whether it was at the initiative of the N. C. and St. L. representatives, representing the Western and Atlantic Railroad or the Cincinnati Southern Railway, I don't remember.

Q. The discontinuance occurred when the Western and Atlantic Railroad passed into the possession of the Nashville, Chattanooga and St. Louis Railroad Company, did it not?

A. After that, yes, when they had taken possession.

Q. Well, shortly after that wasn't it?

A. I don't know exactly how long it was.

Q. Well, it was approximately at the time?

A. A few years afterwards, I think it was.

Q. Since this lease was made is it not true, the Western and Atlantic Railroad leased to the Nashville, Chattanooga and St. Louis Railroad began routing its passengers for the north by way
160 of the Nashville, Chattanooga and St. Louis and the Louisville and Nashville Railroads?

A. While we had sleeping car service that was continued, I don't think that was so, sir.

Q. I am not speaking of through sleeping car service, I am speaking of the sale of passenger tickets generally. Isn't it true that when the lease was made of the Western and Atlantic to the N. C. and St. L., your northern business over the Cincinnati Southern, generally speaking, was discontinued?

A. I don't think that is true sir.

Q. Do you say that the Western and Atlantic continued, after that lease, to route its passengers north over the Cincinnati Southern Railway, as it had before?

A. Well, the passengers used the through sleepers—the passenger business will follow the through car line.

Q. Well, what proportion of the passenger travel used the sleeping car service?

A. Between Cincinnati and Atlanta?

Q. Yes, between Cincinnati and Atlanta.

A. I could not answer that question, sir, I don't know the proportion. I should say that it was the majority of the passengers between Cincinnati and Atlanta used the through car line.

Q. Let us talk first about the business that did not use the sleeper?

A. Yes.

Q. How would that be routed by the Western and Atlantic after it was leased the Nashville, Chattanooga and St. Louis?

A. Well, I haven't got those figures and never had occasion to look it up. I do not know.

161 Q. Weren't you in charge of it?

A. Yes.

A. Well, don't you know, as a matter of fact, that as soon as the Western and Atlantic passed into the control of the Nashville, Chattanooga and St. Louis that upon this class of service, the passengers, they discontinued the use of the Cincinnati Southern Railway?

A. No, sir, never discontinued the use of it as long as that sleeping casr service continued.

Q. I am not talking about the sleeping car service but the day coach?

A. I said a while ago it was not the fact.

Q. They discontinued it as a preferential route, didn't they?

A. I presume they did.

Q. Yes, now, at that time another sleeping car service was installed between Atlanta and Cincinnati, wasn't it?

A. Yes.

Q. How was that sleeping car service, how did that go?

A. When by the Southern station at Chattanooga.

Q. How did it go north?

A. Over the Cincinnati Southern—Oh, you mean by Nashville?

Q. Yes?

A. The Western and Atlantic never had a through car line by Nashville.

Q. Over the Louisville and Nashville, didn't they have a through car line through Nashville over the Louisville and Nashville?

A. No sir.

162 Q. Is there no such through car line now?

A. No sir, there is no through car line over the L. and N. over the Western and Atlantic.

Q. How does that go?

A. Through Knoxville.

Q. When was that opened?

A. It has been five or six years ago, a comparatively short time.

Q. Well, between 1890 and 1895, to five or six years ago, was there any other through sleeping car service between Atlanta and Cincinnati?

A. No sir, ~~not over the~~ Western and Atlantic Railroad.

Q. Not over the Western and Atlantic Railroad?

A. No, sir.

Q. Didn't the Nashville, Chattanooga and St. Louis sell tickets to Cincinnati, from Atlanta to Cincinnati?

A. Yes, sir.

Q. How did they go?

A. Went by Nashville and Louisville.

Q. Nashville and Louisville?

A. Yes, sir.

Q. When did the selling of tickets over that route begin?

A. Which route?

A. The one you have just spoken about?

A. Via Nashville and Louisville?

Q. Yes?

A. Always had them on sale, all the time.

Q. Didn't that begin in 1890?

A. No sir.
163 Q. When this lease was made?
A. No sir. We always had tickets on sale that way.

Q. Well, when the lease was made then that became your preferential route in your office, did it not?

A. You mean via Nashville?

Q. Yes, and Louisville?

A. Well, I just explained that to you that while the through sleeping car service was in effect with the Cincinnati Southern Railroad we routed all business to Cincinnati and further north, I should say a very large per cent,—I should say ninety per cent, of the business went that way, by the Cincinnati Southern Railroad so long as that sleeping car was in effect between Cincinnati and Atlanta and southern points.

Q. Day coach passengers as well as sleeping car passengers?

A. No sir.

Q. How did you route the day coach passengers who did not indicate what road they preferred to go over but asked for a ticket by the W. and A. road to Cincinnati?

A. Routed them both ways, by the Cincinnati Southern and the other way.

Q. What determined which way you routed them?

A. The passengers' preference.

Q. Suppose they did not express a preference?

A. I presume they would route them by Nashville.

Q. What is the connection between the Louisville and Nashville and the Nashville, Chattanooga and St. Louis Railroad?

Mr. Wimbish: I object to that on the ground that this witness is merely a passenger agent and does not say that he has any
164 information what ever of the connection between the L. and N. and the N. C. and St. L. that qualifies him to give any such testimony.

A. I have no information, but I have heard that the Louisville and Nashville Railroad owns the majority of the stock of the Nashville, Chattanooga and St. Louis Railroad.

Q. As a matter of fact about the operating policy, is it not a fact that the Nashville, Chattanooga and St. Louis Railroad is recognized as a part of the Louisville and Nashville System?

A. Yes, of the system?

Q. And in the routing of the passengers and the sale of tickets the N. C. and St. L. R. R. of course, always gives preference to the Louisville and Nashville Railroad does it not?

A. Well we are in competition with the L. and N. on some business, you know.

Q. You are not in competition with them to Cincinnati are you?

A. Yes, sir, they have got their through line from here to Cincinnati?

Q. I am talking about prior to five or six years ago?

A. Prior to the building of that road?

Q. Of the Knoxville road?

A. Yes, sir.

Q. Prior to that time?

A. Well, of course prior to that time we worked what business we could through the L. and N. Railroad.

Q. Will you describe the N. C. and St. L. Railroad?

165 A. A complete line from Memphis, and from Hickman, Kentucky, to Nashville and Nashville to Chattanooga.

Q. And it has rails connecting at Nashville connecting with the rails of the L. and N.?

A. Yes sir.

Q. And that has been the case how long?

A. Many years.

Q. You say there is very little passenger exchange at Boyce station between the Western and Atlantic and the Cincinnati Southern?

A. Yes, sir.

Q. The passenger Exchange is more often at Chattanooga, is it not?

A. Yes, sir.

Q. There is a large exchange of passengers at present between the Western and Atlantic and the Cincinnati Southern for local and intermediate points, that takes place at Chattanooga, isn't there?

A. You mean points local to the Western and Atlantic Railroad?

Q. Yes?

A. Yes.

Q. And local on the Cincinnati Southern Railroad?

A. Yes, we do a great deal of business with them there.

Q. That has always been so, has it not?

A. Yes sir.

Q. The passengers from Dalton, and any intermediate points on the Western and Atlantic Railroad and for such points coming from the Cincinnati Southern, take the Western and Atlantic at Chattanooga do they not?

166 A. Yes sir.

Q. Why is that more convenient than Boyce Station?

A. Because of the schedules of the trains.

Q. Do you know any thing about the freight?

A. No, sir, I don't know any thing about the freight.

Q. At Boyce Station where the rails of the Cincinnati Southern and the N. C. and St. L. diverge, a station is built at the point of divergence, between the two tracks, is it not?

A. Well there is a station there, but I could not answer the question about the point of divergence.

Q. Have you seen the station?

A. Yes sir, it is very near the point of divergence there.

Q. Well, it is right where they make an angle where they come together isn't it?

A. Yes, sir, it is between the two tracks.

Q. Jointly maintained by the two roads, the Cincinnati Southern and the Western and Atlantic?

A. That is my understanding, though I do not know that to be the fact sir.

Q. And the station opens and has a platform on one side on the Western and Atlantic and on the other side is a door to the platform of the Cincinnati Southern, is it not?

A. Yes, it used to have one and used to go on either side, but I haven't been there for a long time.

Q. And so far as the schedules make it convenient it is perfectly possible for passengers getting off of one road at Boyce to take the other road at Boyce, is it not?

167 A. Yes sir.

Q. Using simply this one station in the meantime?

A. Yes, sir.

Q. Do you know anything about the volume ~~of business~~ that is now actually exchanged there?

A. I do not. I suggested to Mr. Wimbish today that that could be gotten from Nashville, the exchange of business between the roads.

Q. But you would not undertake to say what it amounts to in volume?

A. No, sir.

Q. And I don't suppose you know what the volume of exchange of passengers between the two roads at Chattanooga is?

A. No, sir, I do not.

Q. Are you familiar with the routing of freight from Atlanta to Cincinnati and points north?

Mr. Wimbish: I am going to put the General Freight Agent on in a moment, Mr. Peck, and he can give you that information.

A. No, sir, I am not familiar with that.

Q. Are you familiar with the price of right of way that is in controversy in this case, between Boyce and Chattanooga?

A. Only in a general way, what I have heard about it. I have no personal knowledge of that?

Q. Have you been over it?

A. Yes sir. I have been over it riding. I have never walked over it, over the track.

Q. This particular right of way?

A. No, sir.

168 Mr. Peck: That is all.

Redirect examination.

By Mr. Wimbish:

Q. Mr. Harman, do you know when the Southern Railway was organized?

A. Yes——

Q. Was it about 1894 or '5?

A. Oh, no sir, it was long before that.

Q. No, the Southern Railway, not the Cincinnati Southern?

A. I know, but the Southern Railway was organized before that date.

Q. Before that date?

A. Before 1894 or '5.

Q. Aren't you mistaken about that?

A. You mean when the old line was built?

Q. I mean when the Southern Railway Company which took over those properties was organized?

A. No sir, I do not.

Q. Do you know when it was, in 1894 and '5?

A. No sir.

Q. Assuming that the Southern Railway Company was organized in 1894, say, or around about that time, was it about that time that the sleeping car line from Jacksonville to Cincinnati by the Western and Atlantic was discontinued?

A. Right along there somewhere. I don't remember the exact date. The N. C. and St. L. took charge of the Western and Atlantic Railroad under the lease, I think it was in 1890, and my recollection
is that it was several years, maybe one or two or three years,
169 after the lease of the Western and Atlantic by the N. C.
and St. L. that the through sleeping car line was discontinued.

Q. Now, what other line was substituted for that between Cincinnati, Atlanta and Jacksonville, how were the through cars moved after they discontinued moving over the Western and Atlantic?

A. My recollection is that before that car line was discontinued over the Western and Atlantic Railroad that the Cincinnati Southern Railroad were operating a through car service to Atlanta and Jacksonville, Florida, by the Southern Railway from Chattanooga.

Q. Now, what is the line of the Southern Railway from Chattanooga, I mean through what points does it run, and how nearly is it a competitive line in point of physical location with the Western and Atlantic?

A. Well, it parallels the Western and Atlantic Railroad and touches it at Rome and Dalton.

Q. Pardon me, but the Western and Atlantic does not run to Rome, does it? That is the N. C. and St. L.?

A. Yes, that is a branch line of the N. C. and St. L. to Rome.

Q. There is a through line at present from Cincinnati to Atlanta by what line, through Pullman car and through day coaches, if there are any?

A. The L. and N. direct through Knoxville, that is one and also the Southern Railway in connection with the Cincinnati Southern via Chattanooga.

Q. What I mean is, if that traffic passes over the Cincinnati Southern, what is the through line?

A. In connection with the Southern Railway.

Q. I believe you testified there was no through service in connection with the Western and Atlantic now?

170 A. No, sir.

Mr. Wimbish: That is all.

Recross-examination.

By Mr. Peck:

Q. Is it not a fact, that from March 1893, to 1900 the Cincinnati, New Orleans and Texas Pacific was under the independent management of Samuel L. Felton, as Receiver of that property?

A. I could not answer that question I do not know.

Q. Didn't you know Mr. Felton to be the receiver of that property?

A. Yes, sir.

Q. Do you know when he became receiver of that property?

A. No, sir.

Q. Do you know how long *we* was receiver of that property?

A. No, sir.

Q. Do you know when he ceased to be receiver of that property?

A. No sir.

Mr. Peck: That is all.

J. A. Sams, a witness called on behalf of the complainants, having been first duly sworn by the examiner testifies as follows:

Direct examination.

By Mr. Wimbish:

Q. Please give you- address.

A. Healey Building, Atlanta, Ga.

Q. What is your occupation?

A. I am division freight Agent of the Nashville Chattanooga and St. Louis System.

171 Q. What part of the Nashville Chattanooga and St. Louis system falls within your jurisdiction, is it the Western and Atlantic *and Atlantic* Railroad?

A. My title covers the whole system, but really my jurisdiction is largely confined to the Western and Atlantic division.

Q. How long have you been connected in that or a similar way, a similar capacity, with the Nashville, Chattanooga and St. Louis Railroad with reference to the Western and Atlantic Railroad?

A. Since 1898.

Q. Since 1898?

A. I think so, Yes sir.

Q. Mr. Sams, will you please state to what extent, if any, there is an exchange of business, freight business, of course, I mean, between the Cincinnati Southern Railway and its lessee the Cincinnati, New Orleans, and Texas Pacific Railway and the Western and Atlantic Railroad at Boyce or Chattanooga or either?

A. There is comparatively no exchange, as I understand it, at Boyce. The exchange is at Chattanooga.

Q. Well now, what freight is given to the Western and Atlantic Railroad by the Cincinnati Southern and its lessee at Chattanooga?

Mr. Peck: Objected to as irrelevant, immaterial and incompetent.

A. The N .C. O. and T. P. gives no freight to the W. and A. Division of the N. C. and St. L. except non-competitive freight, or freight that is routed by our line.

Q. Routed by whom?

A. By the shipper or consignee, or the originating line, or connecting line, we will say connecting or originating lines.

172 Q. Do I correctly understand you and do you wish to be understood to say that the Cincinnati, New Orleans and Texas Pacific does not voluntarily route any freight from Cincinnati to Atlanta and competitive points over the Western and Atlantic except that which is routed by the shipper or originating or connecting lines?

A. That is correct, yes.

Q. What do you mean by shipments to non-competitive points?

A. Local stations of the W. and A. Railroad and the N. C. and St. L.

Q. Will you describe the Southern Railway between Atlanta and Chattanooga, relative to the Western and Atlantic, its route and whether competitive?

A. It parallels the Western and Atlantic Railroad, running from Atlanta through Rockmart, Ga., Rome, Ga., crossed the Western and Atlantic at Dalton, Ga., and again crosses the Western and Atlantic this side of Chattanooga.

Q. How long has this condition continued, that is that the Cincinnati Southern has given, of its own will, no freight to the Western and Atlantic?

A. Well, it has been a good many years, I could not tell you when it began, but it has been, I suppose, ten or fifteen years, fully.

Q. When was the Knoxville division of the L. and N. extending from Cincinnati to Atlanta opened for business?

A. In 1896.

Q. Since that time?

A. I think it has.

173 Q. To what extent is that line a competitor with the N. C. and St. L. and the L. and N. Railroad for freight from Cincinnati to Atlanta and south?

A. You mean the L. and N. a competitor of the N. C. and St. L.?

Q. The Knoxville division a competitor of the road through Nashville?

A. Why, it has been an absolute competitor a 100 per cent competitor in fact. The Nashville route, you might say no longer exists.

Q. Is it or not all required to go by Knoxville?

A. All required by the L. and N. to go by Knoxville.

Mr. Wimbish: You can take the witness.

Cross-examination.

By Mr. Peck:

Q. You came with the Nashville, Chattanooga and St. Louis in 1898?

A. I was the southern agent of the L. and N. and the N. C. and St. L. jointly before, prior to that time.

Q. How long prior to that time?

A. About five or six years, I should say.

Q. At Atlanta?

A. Yes, sir.

Q. What was your connection prior to that time?

A. I was for a few years prior to that time Chief Clerk for the General Southern Agent of the joint lines.

Q. In the freight department?

A. Yes sir.

Q. When did you enter the freight service of the Nashville, Chattanooga and St. Louis Railroad or the N. C. and St. L. and the L. and N. jointly?

174 A. I could not tell you the date, but it was back about 1890.

Q. Back about 1890?

A. Yes, sir.

Q. You say that the C. N. O. and T. P. gives no freight to the W. and A. except for noncompetitive points, or as routed by shipper, consignee or originating or connecting lines?

A. That is true so far as my knowledge goes.

Q. Does the W. and A. give the C. N. O. and T. P. any freight except for noncompetitive points, or as designated by shipper, consignee or originating lines?

A. Gives them in solid train load lots.

Q. What?

A. In solid train load lots frequently, gives them lots.

Q. Other than as designated by the shipper?

A. Yes, sir.

Q. Where does it give it to them?

A. At Chattanooga. The C. N. O. and T. P. is our enclusive line to Cincinnati and points that must go through there.

Q. Why?

A. It is the only line we have open to us.

Q. And you therefore deliver it to the C. N. O. and T. P. in solid train load lots?

A. Often, yes, sir.

Q. At Chattanooga?

A. Yes, sir.

Q. That is for the prompt handling of the freight?

A. We hope so.

Q. You do that because that is the best route that is open to you?

175 A. That is our most available route.

Q. Your most available route?

A. Yes, sir.

Q. That is your best extension to Cincinnati from Chattanooga?

A. It is the only through line we have.

Q. And therefore affords the best outlet that you have got from Chattanooga to Cincinnati?

A. We feel so.

Q. And you use it as such today?

A. Yes, sir.

Q. If it weren't there your freight would have to seek a less convenient channel or route from Chattanooga north?

A. We would have to find another way.

Q. Yes, and there is no other way as convenient, is there?

A. Not for us.

Q. Yes, so the C. N. O. and T. P. road offers a through and convenient outlet for the purpose of the W. and A. at Chattanooga, does it not, in shipping to Cincinnati?

A. Yes, sir.

Q. You say these roads are parallel, the Nashville Chattanooga and St. Louis and the Southern Railway, or the what is it,—East Tennessee, Virginia and Georgia, from Atlanta to Chattanooga, they are how far apart, the average distance?

A. I don't suppose they would average more than ten miles.

Q. And what is their point of greatest divergence?

A. Rome, I expect, about eighteen miles, I expect.

176 Q. There are a good many points, of course, of shipment on each that the other does not reach?

A. That is true, yes.

Q. Freight business designated for such points is freely exchanged between the two systems, is it not?

A. Yes.

Q. That is noncompetitive points?

A. Yes.

Q. The exchange is made at Chattanooga rather than at Boyce on account of the convenience, is it?

A. I think the exchange is very largely now at Chattanooga.

Q. That is where the yard facilities are?

A. Yes.

Q. And that is where the yard crews and engines are?

A. The depots and yards are at Chattanooga. There is some exchange, I understand, at Boyce.

Q. There are facilities for exchanging at Boyce?

A. Yes, limited.

Q. But there is a physical connection there?

A. Yes, a physical connection.

Q. And it is possible to exchange there?

A. Our exchange at Boyce is limited, but it is possible to exchange there.

Q. But the preference is at Chattanooga, at the Chattanooga connection some four miles away is a matter of convenience between the two roads, is it not?

A. Better facilities, yes, sir.

177 Q. It would not be any advantage to the Western and Atlantic to have this exchange take place at Boyce rather than at Chattanooga, would it?

A. I can see very little, if any, advantage in an exchange at Boyce.

Q. The convenience of doing the exchange business at Chattanooga is mutual convenience to both roads, is it not?

A. I should think so.

Q. There is no friction that you know of concerning that particular point of exchange, is there?

A. I could not answer that. That is a transportation matter entirely.

Q. The Nashville, Chattanooga and St. Louis Railway is generally recognized and operated as a part of the Louisville and Nashville, System generally speaking?

A. No, sir.

Q. Is it not?

A. No, sir.

Q. What is its connection with the L. and N.?

A. Friendly.

Q. Does not the L. and N. own a majority of its stock?

A. I can't answer that of my own knowledge.

Q. You say you were the joint agent of the N. C. and St. L. and the L. and N., prior to 1898, from then back to 1890, were in the joint service,—the co-operation between the two systems was then in existence, was it not?

A. So far as my department was concerned, yes, sir.

178 Q. The N. C. and St. L. with reference to the Western and Atlantic operation, became an associate of the L. and N. in 1890, December 1890, when the N. C. and St. L. leased the Western and Atlantic, did it not?

A. I think that is about the date.

Q. That alliance was formed then?

A. What alliance?

Q. Between the W. and A. and the L. and N.?

A. I think that is when the N. C. and St. L. leased the road, about that time, but as to an alliance between the L. and N. and the N. C. and St. L. I can't speak as to that.

Q. Why did they have you as the joint General Agent if there was no alliance between them?

A. I had been joint agent prior to the lease, if I remember correctly.

Q. Of the L. and N. and the N. C. and St. L.?

A. Prior to the lease of the W. and A.

Q. So they were operating jointly those two systems?

A. They handled traffic and I looked after their joint interests in the south.

Q. When the N. C. and St. L. leased the Western and Atlantic, then that came within that field of operation, did it not?

A. No, sir, not for quite a number of years after the lease, before I had any jurisdiction over the Western and Atlantic Division, not until I was made Division Freight Agent of the N. C. and St. L. system.

Q. That was a matter, of course, with your present duties an-organization?

A. That was when I took the position I hold now. Prior to that I had no jurisdiction over the Western and Atlantic.

179 Mr. Peck: I believe that is all.

Redirect examination.

By Mr. Wimbish:

Q. Mr. Sams, does the Nashville, Chattanooga and St. Louis Railway and the Western and Atlantic at Atlanta, receive*d* freight destined for Cincinnati and points through Cincinnati via Nashville and Louisville?

A. No, sir, only through——

Q. If there is tendered to you, destined to Cincinnati and points beyond through Cincinnati, any freight and you perform any haul or service at all over the Western and Atlantic, is it or not true that the Cincinnati, New Orleans and Texas Pacific is the only route open to you?

A. The only road, only line we use.

Q. Do you know the distance from Atlanta to Cincinnati via Nashville and Louisville?

A. I could tell in a very few seconds.

Q. Do so please.

A. I think approximately five hundred and seventy miles.

Q. What is the distance via the Cincinnati Southern from Atlanta to Cincinnati?

A. Four hundred and seventy-four miles.

Q. Now, if it be true, as you have testified, that the short, direct and most convenient route from Atlanta to Cincinnati is via the Western and Atlantic and the Cincinnati Southern is it not equally true that the most direct, shortest and most convenient route from Cincinnati to Atlanta is over the same lines, that is the Cincinnati Southern to Chattanooga and Chattanooga to Atlanta?

180 A. That is true.

Q. Would the traffic naturally and normally move that way in the absence of any interests that divert it?

A. You states from Cincinnati to Atlanta?

Q. Yes.

A. Under present conditions I would expect the C. N. O. and T. P. to use their own line into Atlanta.

Q. I did not say that. I say in the absence of an*d* interest in its being diverted at Chattanooga, would it naturally and normally flow to that way?

A. I think so, it being the short line.

Q. Do you know how traffic moved prior to the organization of the Southern Railway, I mean the traffic from Cincinnati to Atlanta?

A. You 'mean since the Southern Railway completed their line to Chattanooga?

Q. No, before that.

A. It moved by the Q. and C. and the W. and A. as well as some by the L. and N. and the N. C. and St. L.

Mr. Wimbish: Now Mr. Colston, in examining the witness on yesterday and in touching upon the re*al*tion of the C. N. O. and T. P. to the Southern Railway, you stated that you would give me the exact information with respect to that, and I therefore discontinued that examination. May I ask what that information is and when you will give it to me, in what form?

Mr. Colston: I will give it to you in a written statement any time you need it. I would rather not do it now on account of the time, but I can do it in a general way now.

Mr. Wimbish: Well, you have examined this witness with respect to the inter-corporate relation of the N. C. and St. L. and
181 the L. and N.

Mr. Colston: Yes.

Mr. Wimbish: Now, information as to that is irrelevant except as to the C. N. O. and T. P. and the Western and Atlantic, if you wish that to stand——

Mr. Colston: I doubt if he knows.

Mr. Wimbish: Therefore I move to strike out of the record the testimony with reference to the relation of the N. C. and St. L. and the L. and M.

Mr. Peck: I don't think there is any thing in there that we want stricken out. It relates particularly to the practical handling of the freight traffic.

Mr. Colston: If you want a statement from me, I can make it now, but not as completely as I can after I get back to Cincinnati.

Mr. Wimbish: I know that you can and will make me a statement from a legal standpoint, but what I want to know more particularly is as to the practical standpoint, what they do.

Mr. Colston: I don't know anything about that.

Q. Mr. Sams: I will ask you, nothing about what their relation may be legally, between the C. N. O. and T. P. and the Southern

Railway, but in the practical handling of their business, do you know whether they operate as one and the same?

A. That is my understanding, that the C. N. O. and T. P. to Chattanooga and the Southern from Chattanooga are one and the same system, and are so operated. Their stationery and bills of lading as I recall, shows "Southern Railway Lines, West."

By Mr. Colston:

182 Q. Southern Railway System, Lines West?

A. Yes. Southern Railway System, Lines West.

Mr. Colston: That is a practical fact.

Mr. Wimbish: That is what I wanted to get into the record, Mr. Colston.

A. (Continuing:) We favor the C. N. O. and T. P. with the tonnage the routing of which we control destined to or via Cincinnati. They in turn do not favor the W. and A. Division of the N. C. and St. L. with tonnage the routing of which they control.

Q. That is from Chattanooga to Atlanta?

A. I said the W. and A. Division.

By Mr. Wimbish:

Q. And how about points beyond Atlanta, through Atlanta?

A. Well, to Atlanta, and points routed through Atlanta.

Mr. Wimbish: That is all.

Redirect examination.

By Mr. Peck:

Q. The line of the Southern Railway system, the East Tennessee, Virginia and Georgia Railway, from Atlanta to Chattanooga, how does that compare in mileage with the Western and Atlantic between Atlanta and Chattanooga?

A. It is longer than the Western and Atlantic by about thirteen to sixteen miles.

Q. Thirteen to sixteen miles?

A. I forget the exact distance.

Q. So the difference in distance between Atlanta and Cincinnati over the Western and Atlantic and the C. N. O. and T. P. route and the East Tennessee, Virginia and Georgia and the C. N. O. and T. P. route is a matter of some thirteen miles is it not? 183

A. That is right.

Q. The facilities for transportation in the yards between the C. N. O. and T. P. and the East Tennessee, Virginia and Georgia are far more convenient than between the C. N. O. and T. P., and the Western and Atlantic, as to exchange at Chattanooga, are they not?

A. I could not so state.

Q. You are not familiar with that?

A. Not enough to make a positive statement. I think the facilities for exchanging at Chattanooga of the C. N. O. and T. P. with the Western and Atlantic are as good, perhaps are equal to the Southern, but I do not wish to make a positive statement.

Q. Do you know how the facilities for exchange of passengers between those roads are at Chattanooga, which is the most convenient?

A. I am only in the freight traffic department. I would not like to answer that.

Q. Don't they use the same passenger depot?

A. I would not like to answer that.

Q. Do the L. and N. and the N. C. and St. L. operate their freight office jointly in Atlanta?

A. They do not, no, sir.

Q. They operate separate offices?

A. Surely.

Q. And operate separate freight houses in Atlanta?

A. Separate freight houses, yes, sir.

Q. Operate separate freight in Atlanta?

A. Everything separate.

Q. That is to say, when I speak of the N. C. and St. L. I mean the Western and Atlantic?

184 A. I so understand.

Q. Your answers were with reference to the Western and Atlantic when I spoke of the N. C. and St. L.?

A. Yes, sir.

Q. The Western and Atlantic is operated as a part of the N. C. and St. L.?

A. It is the only connection we have into Atlanta.

Q. The N. C. and St. L. has no rails into Atlanta, has it?

A. Nothing except the Western and Atlantic.

Mr. Peek: That is all.

I. O. Walker, a witness called on behalf of the complainant, having been first duly sworn by the examiner, testifies as follows:

Direct examination.

By Mr. Wimbish:

Q. What is your profession?

A. Division Engineer of the Western and Atlantic Division of the N. C. and St. L.

A. Are you connected with the operating department of the N. C. and St. L. Railway?

A. Yes sir.

Q. With respect to which division?

A. We call it the Atlanta Division,—the Western and Atlantic Railroad.

Q. Please state to what extent if any, the Nashville, Chattanooga and St. Louis Railway, is operated separately from and independently of the Louisville and Nashville?

A. Entirely independent.

185 Mr. Wimbish: He is with you.

Cross-examination.

By Mr. Peck:

Q. Do you know——

Mr. Wimbish: I am perfectly willing to stipulate that the Louisville and Nashville owns a majority of the stock of the Nashville, Chattanooga and St. Louis. It is a matter of public record.

Mr. Colston: That has been the case for how many years?

Mr. Wimbish: I cannot tell you that, but for a number of years.

Mr. Peck: Then I have no questions.

Mr. Wimbish: I have another witness that I intended to offer at this time, Maj. J. L. McCollum, who has been for many years with the Western and Atlantic Railroad but the Major desires to refresh his recollection by a visit to Chattanooga and the examination of certain records there, and I should, therefore, like to postpone his examination.

After consultation, it was agreed by and between counsel that this witness should be sworn at this time, but his examination postponed until a future hearing.

J. L. McCollum, a witness called on behalf of the Complainant, having been first duly sworn by the examiner, testifies as follows:

Direct examination.

By Mr. Wimbish:

Q. Major, please state your position and address?

A. I am now general agent of the operating department
186 of the Nashville, Chattanooga and St. Louis Railroad Company.

Q. What is your business address?

A. 1218 Healey Building, Atlanta, Ga.

Q. How long have you been connected with the Nashville, Chattanooga and St. Louis Railway?

A. Forty-seven years the first of July.

Q. Will you just briefly state in what capacity and where at, what locations?

A. Well, I have — variously employed but in the beginning I was agent, I was agent of the N. C. and St. L. Railway Station in Chattanooga in 1874, beginning in 1874 and continuously up to 1891, to our taking over of the Western and Atlantic. Then I was transferred to Atlanta, with headquarters in Atlanta, as superintendant of the Western and Atlantic until a few years ago, and since then I am connected with the executive staff as General Agent.

By consent of counsel of the respective parties the taking of further testimony of this witness was postponed until, and will be resumed at Chattanooga, Tennessee, March 22d, 1918, or such other date as counsel may agree*d* upon or as may be agreeable to the witness, if it is found impossible or inadvisable to continue the hearing on said date.

Mr. Wimbish: I now offer in evidence on behalf of the State of Georgia, the complainant, a paper which I have denominated 187 a disclaimer or surrender on the part of the Nashville, Chattanooga and St. Louis Railway, to the possession or right of possession as lessee under the lease act of November 12th, 1889, to that part of the right of way and property of the Western and Atlantic Railroad between Boyce Station and Chattanooga, Tennessee, forming the subject matter of the controversy in this case. While this may, perhaps, be more proper in rebuttal, it is now offered in responce to the allegation of paragraph XIV of the Answer filed by the defendants herein at pages 20 and 21, that exclusive possession of the property forming the subject matter of this suit is in the Nashville, Chattanooga and St. Louis Railway, under its lease from the State of Georgia.

Mr. Peck: We object to this document on the ground of form as well as substance. We object to it on the ground that its execution is not proven. We also object to it as incompetent, irrelevant and immaterial. And we demand a right to cross examine the party signing the document and the attesting witness concerning matters regarding the execution of the same.

188 Paper received and marked Complainant's Exhibit "A," the complainant reserving the right to make proof of execution at a subsequent hearing, and is as follows:

COMPLAINANT'S EXHIBIT "A."

"STATE OF TENNESSEE,
County of Davidson:

"Know all men by these presents:

"The Nashville, Chattanooga and St. Louis Railway as lessee of the Western and Atlantic Railroad from the State of Georgia, pursuant to an Act of the General Assembly of said State, approved November 12th, 1889, hereby disclaims any and all right to the possession, use, occupation or enjoyment of that part of the original right of way of the said Western and Atlantic Railroad in Hamilton County, Tennessee, between Boyce Station and Chattanooga lying westerly of a line running parallel with and nine and one half (9½) feet from the center of the track of the Western and Atlantic Railroad, which at the time of said lease was and now is, being used and occupied by the Cincinnati, New Orleans and Texas Pacific Railway Company, as lessee of the Cincinnati Southern Railway; and in the event the said lease should be construed as vesting in or transferring to the lessee any right to possession, use, occupation or enjoyment of

said parcel of land hereinabove referred to, in presenti or
189 futuro, the Nashville, Chattanooga, and St. Louis, Railway,
as such lessee, hereby surrenders and transferrs to the State of Georgia, absolutely and unconditionally, but without recourse, any and all such right to the possession, use, occupation or enjoyment of said property for any purpose whatever."

In witness whereof, The Nashville, Chattanooga, and St. Louis Railway has caused these presents to be executed in its name and behalf by John Howe Peyton, its President, and has caused its corporate seal to be hereunto attached by its Secretary on this 16th day of February 1917.

[SEAL.] (Signed) JNO. HOWE PEYTON,
As President of the Nashville, Chattanooga and St. Louis Railway."

Attest:
(Sd.) F. A. CLARKSON, *Secretary."*

Thereupon the hearing was adjourned, until a time to be agreed upon by counsel or if not called at an earlier date, to be resumed at Chattanooga, Tennessee, on March 22, 1918. Counsel for defendants being unable, for lack of time, to review the stipulations su-mitted to them by counsel for *complaint*, as revised and recopied, took same with them with the understanding and agreement that if found satisfactory they will sign and return the same.

190 Owing to desire of counsel for defendants to return to their homes on this date, it is further agreed that if it is found necessary by complainant to take further testimony, certain witnesses being present and offered at this time, and the same cannot be taken within the period of thirty days fixed by the "Stipulation for the taking of testimony" within which the taking of testimony in chief by the complainant shall be completed, such time shall be extended for a sufficient time to permit the taking of such testimony by the Complainant.

It is further stipulated and agreed by and between counsel that the signatures of witnesses to their testimony shall be waived.

Thereupon the hearing of testimony was adjourned until March 22d, 1918, at 11 o'clock A. M. unless sooner resumed by consent of counsel.

Stipulation submitted by counsel for complainant, finally agreed upon and signed February 23d, 1918, is filed this 2d day of March, 1918, and transmitted herewith.

191 In the Supreme Court of the United States, October Term, 1917.

Original, No. 23.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY, and The Cincinnati, New Orleans and Texas Pacific Railway Company.

Chattanooga, Tenn., March 22d, 1918.

Pursuant to adjournment the hearing was called for the taking of further testimony in the above stated cause, at the County Courthouse, at Chattanooga, Tennessee, this 22nd day of March, 1918.

The following appearances are noted:

William A. Wimbish, Esq., of Atlanta, Ga., for the Complainant.

Edward Colston, Esq., of Cincinnati, Ohio and W. T. Porter, of Cincinnati, Ohio, and M. M. Allison, Esq., of Chattanooga, Tenn. for the Defendants.

JOHN HOWE PEYTON, a witness called on behalf of the complainant, having been first duly sworn by the Examiner, testifies as follows:

Direct examination.

By Mr. Wimbish:

Q. What official connection have you with the Nashville, Chattanooga and St. Louis Railway?

192 A. President.

Q. How long have you been president?

A. Something over four years.

Q. I hand you a paper purporting to have been executed by you as President of the Nashville Chattanooga and St. Louis Railway, and purporting to be a disclaimer of any right on the part of that Company to that portion of the right of way of the Western and Atlantic Railroad occupied by the Cincinnati Southern Railway, and a disclaimer of any such right as you may have obtained. Please examine that paper, Mr. Peyton, and tell us if you signed that?

A. (After examining.) That is my signature, and the paper is one I remember having executed.

Q. Are you familiar with the seal of the Company?

A. Yes, sir.

Q. Is that the seal of the Nashville, Chattanooga and St. Louis Railway?

A. Yes, sir, I think so, yes.

Mr. Colston: Do you offer this in evidence?

Mr. Wimbish: Yes, sir, it has already been offered and marked, subject to proof of execution.

Mr. Colston: The defendants object to the introduction of this disclaimer of date the 16th day of February 1917, on the ground that the same is immaterial, irrelevant and incompetent, and not waiving objection counsel for defendants proceeds to examine Mr. Peyton.

Cross-examination.

By Mr. Colston:

Q. Mr. Peyton, I will ask you this; was this document I have just spoken about, which is marked "Complainant's Exhibit A", signed by you on the date that it bears, to-wit: the 16th day of February, 1917?

193 A. It was signed by me, that is my signature, but my memory is not sufficient to recall the date.

Q. Well, you know nothing to the contrary but what it was signed on that date?

A. I know nothing to the contrary.

Q. I want to call your attention to the printed copy of the bill of complaint in this case and to the fact that it was sworn to on the 16th of February, 1917, the same date on which this Exhibit "A" was executed, the dates correspond, do they not?

A. Yes, they correspond.

Q. Mr. Peyton, at whose suggestion did you execute this paper, Exhibit "A"?

A. That paper came to me from the General Counsel of our system, Judge Claud Waller with some memoranda, or correspondence with Mr. Wimbish of Atlanta, Georgia.

Q. Well, is it not a fact that you executed this paper for the purpose of enabling the State of Georgia to be rid of any obstacle that the lease to the Nashville, Chattanooga and St. Louis, which expires in 1919, might present?

A. I think so.

Q. That was the purpose of executing this paper?

A. That was part of the purpose at least.

Q. Well, that was the principal purpose, wasn't it?

A. I think so.

Q. Now, what understanding did you have, if any, as to what should take place in case the State of Georgia succeeded in recovering from the defendants in this case this piece of right of way, twenty-three and one half feet wide by four or five miles long?

194 A. No understanding of any kind.

Q. Was there any undertaking by anybody or any person, in case the State of Georgia succeeded in recovering this property; that this property should pass under this lease that expires December 27th, 1919?

A. No such suggestion was ever made to me.

Q. Was it your understanding, then that you were giving up this 23½ foot right of way permanently to the State of Georgia?

A. It was my understanding we had no right to it,—no title to it.

Q. Was that because it had passed, under the grant, to the Cincinnati Southern?

A. It was because as I understood it, of the Act of the Legislature of date 1879, under which the right to occupy that portion of the property of the State of Georgia had passed to the Cincinnati Southern Railroad.

Q. If you did not have any right to it, why did you execute a paper surrendering your right to it?

A. Because it was absolutely clear, as we understand it, whether we had any right or not I was advised by our General Counsel that we had no right.

Q. You thought it passed to the Trustees of the Cincinnati Southern?

A. I can't recall whether he went into it fully as to his views, but he thought we had no right to it under the conditions.

Q. Did you deliver this paper, Exhibit "A" to anybody?

A. I do not recall, it probably went to my Secretary and he delivered it to some one, perhaps.

195 Q. Did you hand it to him and tell him to deliver it?

A. I don't know, I do not recall.

Q. When it passed out of your hands it passed to your Secretary?

A. I can't say positively, that is the ordinary course.

Q. And was he told to do something with it?

A. Not that I recall.

Q. Did you write a letter transmitting this to anybody.

A. I do not recall any.

Q. Was there any resolution of the Board of Directors of the Nashville, Chattanooga and St. Louis Railway passed authorizing you to sign this paper, Exhibit "A"?

A. I think not.

Q. Is there a by-law of your Company that authorizes you to sign this paper as President?

A. I am unable to answer that. I would have to ask my counsel as to that.

Q. Well, may I ask you—-your counsel is in Nashville, of course, Judge Claud Waller?

A. Yes, sir.

Q. May I ask you to ask him to send to Mr. Gilmore, the Examiner, any by-law of the Company that in his judgment would authorize you to execute this?

A. I would be very glad to.

Q. Will you do that?

A. Yes, sir.

Q. Judge Claud Waller is not here?

A. Mr. Hill, who is Secretary of the Company, is here.

196 Mr. Wimbish: I naturally object to that method of producing the evidence.

Q. When you say that the object, or one of the principal objects of executing this deed was to enable this suit to be brought, or rather to remove any obstacle that otherwise might exist to the bringing of this suit, do you mean it was done to enable the State of Georgia to have recourse to the Supreme Court of the United States?

A. I can't say that clearly. I understood that the State of Georgia contemplated endeavoring to recover the property and it was the opinion of the counsel for the State of Georgia that the clear possession or ownership of that piece of ground, without any encumbrances or liens upon it would clear up some difficulty which I was not sufficient lawyer to understand, and therefore, the situation for the suit would be improved by any doubt or difficulty of that kind being removed by a disclaimer.

Q. That was the purpose of its execution?

A. That is one of the purposes, as I understand it.

Q. One of the principal purposes?

A. I should think so.

Q. Was the Nashville, Chattanooga and St. Louis ever asked to join the State of Georgia in bringing this suit?

A. Not that I know of.

Q. To recover this strip of ground?

A. Not that I know of.

Q. Was it told to you that the Supreme Court of the United States would not have jurisdiction if the Nashville, Chattanooga and St. Louis Railway was made co-complainant with it in this case?

197 A. I do not recall that anything of that kind was ever talked about.

Mr. Colston: I think that is all, Mr. Wimbish.

Mr. Wimbish: You are excused Mr. Peyton. Do you desire further proof of the execution of the paper?

Mr. Colston: No, no indeed.

Hunter McDonald, a witness sworn and examined on behalf of the plaintiff at the former hearing at Atlanta, Ga., on February 19th, recalled for further examination.

Cross-examination cont'd.

By Mr. Colston:

Q. Mr. McDonald, in your testimony taken in Atlanta on February 19th, 1918, you were asked to supply information with reference to the assessment of the Western and Atlantic Railroad between Boyce Station and Chattanooga and you said that you could not answer that question from recollection, but would supply the information; have you that information now?

A. I have before me a copy of the returns which are made to the State of Tennessee for the years 1915 and 1916. The Western and Atlantic Railroad returned 15.45 miles of main line at $20,000 a mile and 10.97 of side line at $2,000 per mile, making a total of $330,940. in which they gave the entire mileage of the Western and

Atlantic Railroad within the State of Tennessee, you see, for a width of sixty-six feet.

By Mr. Wimbish:

Q. The return shows, you mean, that width?
A. The return shows no width of right of way, it was not asked for. What I thought you asked for, was the right of way re-
198 turned and I answered by telegraph that we returned all of the right of way for sixty-six feet, which was correct.

By Mr. Colston:

Q. Now, Mr. McDonald, if you had returned for taxation a width of sixty-six feet from Boyce Station to Chattanooga, you would have returned for taxation thirty-three feet which was covered by a double track line of the Cincinnati, New Orleans and Texas Pacific Railroad, would you not?

A. Yes, sir.

Q. Was it your intention to give in for taxation that double track of the Cincinnati, New Orleans and Texas Pacific Railway?

A. No, sir, only the right of way of the Western and Atlantic Railroad.

Q. You know, as a matter of fact, that you could not separate the right of way from the double track line of the Railroad, don't you?

A. I presume it would be difficult unless you tore it up.

Q. The fact is that under the system of taxation in Tennessee the width of the right of way is not specified in the tax assessment at all, is it?

A. No, sir.

Q. Neither is it specified in the returns?

A. No sir, but the question that was asked me asked what the width was.

By Mr. Wimbish:

—. You mean the question that was asked you by counsel in the original question that was asked in Atlanta?
199 A. That I was asked in Atlanta.
Q. And by counsel?
A. The question I was asked to answer and that has been read.

By Mr. Colston:

Q. Do you mean to say now that when you returned this property for taxation that you stipulated in the return that the right of way was sixty-six feet?

A. No, indeed. No, the return showed no width of right of way at all, but there was no distinction betweeen that portion between Chattanooga and Boyce Station and that portion between Boyce Station and the State line. It was all returned in the same way.

Q. Now, the actual tax assessment made by the railroad Commission of Tennessee was made upon the mileage of right of way and track owned by the State of Georgia, known as the Western and Atlantic Railroad right of way, was it not?

A. Yes, that return was for 15.45—I have here a copy of the books at the Capitol showing how it was assessed. It was assessed at 15.45 miles in Tennessee, at $32,000 a mile, $494,400.

Q. The further fact that it was assesses at thirty-two thousand dollars a mile would be conclusive proof that it did not include three main lines of railway would it not?

Mr. Wimbish: We object to that as argumentative.

A. I think not. We did not return but one main line, however.

Q. You only have the assessment valued as a single main line track over the right of way that was assessed?

200 A. Yes, sir.

Q. You don't know whether that would be the same as the assessments for other years?

A. I have stated that was for the years 1915 and 1916.

Q. Is what you say with reference to this assessment true throughout all the years running back to 1879?

A. I think so.

Q. The Nashville, Chattanooga and St. Louis Railway, under this lease, was required to pay the taxes on that part of the western and Atlantic leased by it?

A. Within the State of Tennessee, yes sir.

Q. That is correct?

A. Yes, there has been no tax in Georgia.

Q. And that is all you undertook to do?

A. Yes sir.

Q. You did not have this right of way that was occupied by the tracks of the Cincinnati, New Orleans and Texas Pacific?

A. Well, now that is a question I cannot answer. Our lease required the Western and Atlantic Railroad should endeavor to protect in every possible way—What I mean to say is the lease required the Nashville, Chattanooga and St. Louis Railway to endeavor to protect in every possible way the property of the Western and Atlantic Railroad and in doing so, as real estate agent of the road, I, actually not knowing whether they really owned that right of way or not, probably did not make an exception of that width at that time and it was not taken out of the assessment.

Q. Mr. McDonald, was there ever any question raised, or any suggestion made, to you about the State of Georgia owning this

201 part of the right of way occupied by the Cincinnati, New Orleans and Texas Pacific Tracks, until 1916?

A. Yes, the question—the suggestion was made very early after the lease was perfected. I think a bill was introdiced in the Legislature, if I am not mistaken of Georgia.

By Mr. Wimbish:

Q. When?

A. Why, it was one or two years after we took the lease, I don't remember when.

Q. In the early nineties, about when?

A. We took the lease December 27th, 1890, then a short while after that there was a bill introduced in the Legislature for the purpose of ejecting the Cincinnati Southern from this particular track, that is my recollection. I may be wrong, but that suggestion was made at that time and of course attracted my attention to the fact that the Cincinnati Southern was on the right of way of the Western and Atlantic Railroad. Just exactly what attitude we should assume toward that ownership I never heard from our attorney or anybody else. I did not know, and when the time came to return taxes I put it in as a right of way thirty-three feet on each side; that is I made no exception for the line between Boyce Station and Chattanooga that I would have made on account of the occupation by the Cincinnati Southern.

By Mr. Colston:

Q. You have just stated you did not return any specific width of right of way at all?

202 A. I say I made no exception to the value of it, you will allow me to add, that made to the value of the track on account of the occupation of the track by the Cincinnati Southern.

Q. You valued it all at twenty thousand dollars a mile?

A. Yes, sir, it was returned at twenty thousand dollars a mile.

Q. You spoke of this bill having been introduced in the Legislature, did you speak of your own knowledge?

A. I was asked the question whether any suggestion had ever been made to me and that is the question I was endeavoring to answer.

Q. Do you know what became of that bill?

A. No, sir.

Mr. Colston: That is all. We are very much obliged, Mr. McDonald.

Mr. Wimbish: I will put up Major McCollum now. You will remember his examination was begun in Atlanta and then suspended because he wished to have an opportunity to refresh his memory on some points.

Major L. J. McCollum, a witness called on behalf of the complainant, having been sworn at the hearing in Atlanta, Georgia, on February 19th, 1918, resumed stand for further examination.

Direct examination cont'd.

By Mr. Wimbish:

Q. Major, you have already been sworn in this case?

A. Yes sir.

Q. And began your testimony in Atlanta?

A. Yes sir.

Q. Major, where did you reside in 1878, '79 and '80?

203 A. Well, I lived in Chattanooga from 1886 up to 1891.

Q. In 1879 did you occupy any official relation with the City of Chattanooga?

A. I was in the City Council, and I believe I was Mayor pro tem. in 1871.

Q. Were you, because of your residence in Chattanooga and your official position, much interested in all that affected the public and this City?

A. Yes, sir, I naturally got an interest in the City.

Q. Were you advised of the desire of the Trustees of the Cincinnati Southern Railway to use a portion of the right of way of the Western and Atlantic Railroad for entrance into the City of Chattanooga?

Mr. Colston: Objected to as incompetent and immaterial.

A. Why that was discussed freely for years. The entrance of the Cincinnati Southern, from the time its construction was projected up to the time it was constructed, the special interest of Chattanooga people to get it into Chattanooga, get them to run a line into Chattanooga.

Q. I mean only the use of the Western and Atlantic Railroad right of way for the purpose of entrance into Chattanooga?

A. Well, they occupied, you know they occupied—operated on the tracks of the W. and A.

Q. Prior to that, Major, my question is, were you advised of the desire of the Trustees of the Railroad to come into Chattanooga over the right of way of the Western and Atlantic. 204

Mr. Colston: The same objection.

A. Oh, yes, we frequently had discussions, it was frequently discussed with Major McGuffy, at the time representative of the C. F. Q. and C. T. and the Cincinnati, he repreesnted the trustees,—I mean of the Cincinnati Southern, and he frequently talked in my presence about the matter.

Q. Do you know any thing about his acting as attorney and representative of the Cincinnati Southern in trying to obtain authority for the Cincinnati Southern for the use of this right of way?

A. Yes, sir, I remember he went to Atlanta and went before the Legislature, trying to get authority to have this—for the use of the right of way from Boyce into Chattanooga. He went there as the representative of the Trustees.

Q. What do you know concerning the proposition that the Cincinnati Southern would join the Western and Atlantic at Boyce. thereby making a through line or trunk extension of the Western and Atlantic, state what you know and the authority you have to speak and what you learned in that regard from Major McGuffy?

A. It was undertsood in my conversation with Major McGuffy and other interested parties that the road, that the line of the Cincinnati Southern was to be an extension of—that the Cincinnati Southern and the W. and A. were to be one line, a through line from

Cincinnati to Atlanta, and the line was connected up through by construction, and the road is still there, still connecting the two roads up, that is it was built and never occupied, the line shows for itself.

205 Q. How about the Chattanooga part of the road?

A. And the Chattanooga people were very much interested in getting it into Chattanooga. I know we discussed it frequently at that time, we were all interested in getting them in here, getting the line in here, but the details, of course, I did not understand except by hearsay and discussion.

Q. The only part I want to get at or get your testimony concerning, Major, is whether the main, through line was to extend from Cincinnati to Boyce and connect with the Western and Atlantic Railroad, with what might be called a side line into Chattanooga?

Mr. Colston: We object to the question as leading and as incompetent, irrelevant and immaterial.

Q. Or whether the main line was to be constructed to Chattanooga, in the first instance, and the Connection with the Western and Atlantic only in Chattanooga?

A. The through line was to be, it was to be constructed as a through line from Cincinnati, as I understood it over the W. and A. to Atlanta, and they built a line over this side of the bridge connecting with the Western and Atlantic road, and afterwards a switch yard was built up this side, when they abandoned that a switch line for traffic was put in there just this side of that connection and business exchanged there by agreement by the then operative of the Western and Atlantic road and the Cincinnati Southern. I was not connected with either of the roads at the time, but I know that that was the fact, and that was done when I took charge of the Western and Atlantic road for a short period.

206 Mr. Wimbish: You may examine the witness.

Cross-examination.

By Mr. Colston:

Q. What you speak about was principally hearsay?

A. Yes, sir, in conversation. Personally I have no part in it.

Q. These were principally expectations that people were throwing out and what they thought would be a good thing for them?

A. It was the general talk here with the people, yes, sir, having the line built into Chattanooga, not leaving Chattanooga on the wayside. We wanted the line in here and we all clammored for it.

Q. Do you know that under the law under which the Cincinnati Southern was built, they had no authority to go beyond Chattanooga?

A. I know no such law, no sir.

Q. You don't know anything about whether the Trustees of the Cincinnati Southern Railway had authority to build the road to Atlanta or not, do you?

A. I do not sir.

Q. What you testify to was principally the discussion and expectations and hopes of the people?

A. As a citizen of Chattanooga and being interested here I naturally took an interest in it and listened and participated in the discussions.

Q. This Major McGuffy you spoke about is dead, isn't he?

A. Yes, sir.

Q. When did he die?

A. I think within the last two years, I don't remember just the date, probably within the last year.

207 Q. Do you remember another man by the name of George H. Hazelhurst?

A. Yes, sir.

Q. What was he, a civil engineer?

A. Yes, sir.

Q. Was he ever lessee of the Western and Atlantic Railroad?

A. No, sir.

Q. You don't know whether he was or not, do you?

A. Well, I knew Mr. Hazelhurst for many years and I never knew him to be connected with the W. and A. Road, except he was with the Macon and Brunswick,—constructed the Macon and Brunswick road.

Q. He was a railroad builder in the south here?

A. He was, yes.

Q. And was prior to October, 1879?

A. Yes, it was sometime before that, I think, when he retired from railroading.

Q. He was a man of high reputation?

A. A man of good reputation, yes sir.

Q. A civil engineer?

A. Yes, sir.

Q. He is dead?

A. Yes, sir, many years.

Q. Did you know Campbell Wallace, who was President of the Merchants National Bank of Atlanta?

A. Yes, sir.

Q. Is he dead or living?

A. He is dead many years.

Q. Did you know John W. Robertson?

A. Yes, sir.

208 He represented, as I remember—I may be mistaken in the initials of the man, but I can explain what I knew, he represented or he was in charge of the Green Line Car Service, if that is the man you refer to, for many years, this is prior to and during the dates, perhaps, that you mention.

Q. The John W. Robertson I refer to was a civil engineer of experience?

A. I don't know that he was a civil engineer,—I don't know that that was the man I refer to.

Q. The man who undertook to grade the Western and Atlantic Railroad from Boyce Station to Chattanooga?

A. Perhaps he was not the man I knew. The man I knew had charge of the Green Line Car Service in Chattanooga taht is the man I thought you referred to.

Q. Do you remember Mr. Hazelhurst taking much interest in the fact that Georgia would make a grant to the Trustees of the Cincinnati Southern Railway for this 23½ feet of right of way from Boyce to Chattanooga?

A. I don't know, sir. I don't know what interest he took in it.

Q. You never heard of Mr. McGuffy speak about this George H. Hazelhurst?

A. I have heard of George H. Hazelhurst, he was living here may be, and I knew him personally, and knew Major McGuffy very personally and was associated with him many times.

Mr. Colston: That is all.

Mr. Wimbish: You are excused Major.

I think with that examination the state will now rest. In this connection, however, let me refer to a letter that you wrote, 209 Col. Colston, and concerning any correspondence that may have taken place between the Western and Atlantic Railroad Commission, and I as its counsel, and the Nashville, Chattanooga and St. Louis or any of its officials, or may I make a statement in my place and then produce any thing you may want that we have? The question of the right of the Nashville, Chattanooga and St. Louis Railway to the use——

Mr. Colston: You are making a professional statement?

Mr. Wimbish: Yes sir, and leading up to the proposition to see if you will want any thing more,—of the right of way in Hamilton County, Tennessee, occupied by the Cincinnati Southern Railway, was discussed by me personally, with Judge Claud Waller, at my Office in Atlanta, with the knowledge and acquiescence of the Western and Atlantic Railroad Commission. There was no communication in writing as between any of these parties. The matter was fully discussed, and this disclaimer was prepared in my office, jointly by Judge Waller and myself. It was taken by him to Nashville. After its execution it was transmitted to me with merely a letter of 210 transmission and asking pardon for a few days' delay, nothing else. I received and transmitted that paper to the Chairman of the Western and Atlantic Railroad Commission with a formal letter, copy of which I have if you desire.

Prior to that time I had made a report to the Western and Atlantic Railroad Commission on this subject, as its counsel, which report is official and public and a copy of which, or an extract of copy of which I have with me and you are entirely welcome to its use if you so desire. I will submit it to you. (Paper handed to counsel for the defendants.)

I also have an extract from the minutes of a meeting of the Western and Atlantic Railroad Commission, showing that this disclaimer or surrender has been accepted and filed.

Now, beyond that there are no communications whatever between the Western and Atlantic Railroad Commission or any of ots officers, so far as I am advised, with and officer of the Nashville, Chattanooga and St. Louis Railway concerning this matter.

Mr. Colston: Will you give me, or furnish us a copy of your letter of transmission of that document to the Commission of the Railroad and also its action upon receiving the same?

211 Mr. Wimbish: Here is a carbon of that letter and an extract from the minutes (producing papers). Do you desire those filed?

Mr. Colston: Yes sir.

Mr. Wimbish: I produce them, then sir, and you can offer them. There is an extract from my report to the Commission also (producing paper).

Mr. Colston: I think they had better go in.

Mr. Wimbish: I will state: Under request from counsel for the defendants, counsel for *plainplainant* now produces copy of report made by him to the Western and Atlantic Railroad Commission submitted to the Commission's meeting on February 13th, 1917, and his letter to Hon. C. M. Candler, Chairman of the Western and Atlantic Railroad Commission, of date February 24th, 1917, proceeding of the Western and Atlantic Railroad Commission of April 16th, 1917.

Admitted in evidence and marked Complainants' Exhibits "B," "C," and "D" respectively.

Mr. Wimbish: We rest for the State.

Mr. Colston: I will call Mr. Pennebaker.

212 Isaac Pennebaker, a witness called on behalf of the defendant, having been first duly sworn by the examiner, testified as follows:

Direct examination.

By Colston:

Q. You will not be offended if I ask you how old you are?

A. No, sir, and I will tell you. If I live until the fifteenth of June I will be eighty-five years old.

Q. And you are not ashamed of it?

A. No, not a bit.

Q. How long have you lived in Chattanooga?

A. Well, I have lived in Chattanooga, I might say, since 1879. I have been stationed out a little while; I was at Oakdale a couple of years, but Chattanooga has been my home and I might say I have been in and out. Since 1886, I have been here permanently.

Q. Did you run as a locomotive engineer on the N. C. into Chattanooga?

A. Yes sir.

Q. Did you ever work for the Cincinnati Southern Railway?

A. Yes sir.

Q. Do you remember when you commenced work on that road?

A. In 1879, I commenced working for R. G. Houston and Company, Contractors.

Q. R. G. Houston and Company were contractors building the line of the Cincinnati Southern?

A. Yes, sir.

Q. They were building the line from Boyce Station north?

A. Yes, sir.

213 Q. Do you remember about what time that part of the Cincinnati Southern road, the building of it, commenced at the south end, or toward the south end and west north and connected with the part of the road that was building from the north, south?

A. Yes sir.

Q. When was that?

A. On the 10th day of December 1879, I would judge about half past two o'clock along there, I don't know the exact time.

Q. Where did that connection take place?

A. It took place in Robbins tunnel, I don't know what the number of the tunnel is. It was called Robbins tunnel at any rate at the time,—this side of New river, in the Tunnel.

Q. Do you remember when the Cincinnati Southern railroad was first put in operation in Chattanooga, whether the cars passed over the rails of the Western and Atlantic Railroad tracks?

A. Yes, sir.

Q. From Boyce Station to Chattanooga?

A. Yes, sir, they did.

Q. Where did they,—what depot did those cars enter at Chattanooga?

A. The passenger entered into what is termed—well *if* is the Nashville depot the Union Depot now.

Q. On 9th Street?

A. On 9th Street, that is the passenger. The freight went to the Cincinnati Southern Depot.

214 Q. Now, I want to ask your attention to that time when the cars, the Cincinnati Southern cars were coming in from Boyce to Chattanooga over the rails of the Western and Atlantic, and ask you whereabouts the round house and shops of the Cincinnati Southern were located in Chattanooga?

A. At the same place they are now.

Q. Well, did you know anything about there being a cross-over there, from the west side of the Western and Atlantic tracks to those shops and to the Round House?

A. Yes, sir, there was a cross-over there.

Q. Where was that cross-over do you remember?

A. Well, that cross-over is west of East End Avenue, I could not tell you the distance, but a short distance.

Q. And there was a cross-over made there at that time?

A. Oh, yes.

Q. When was that completed and run, with reference to the time when the cars came in over the Western and Atlantic rails?

A. I don't remember the time of that—if I understand your question, it was at what time after they run into Chattanooga.

Q. Yes?

A. Well, that was about at the same time.

Q. Do you know where the present interlocker plant is now about East End Avenue?

A. Yes, sir, I know.

Q. Was this early cross-over you have spoken about nearer to Chattanooga than that,—nearer to East Market Street?

A. Yes it was.

Q. Do you remember when the tracks of the Cincinnati Southern were built in from Boyce to Chattanooga?

215 A. Well, no, I don't just recall the time. It was a couple of years after—you mean on the right of way——

Q. On the right of way that the western and Atlantic built their line?

A. Yes, it was a couple of years after that.

Q. A couple of years after what?

A. After they came into Chattanooga first.

Q. You don't know the particular date about that, you did not make any memorandum of it?

A. No, but it seems to me it must have been along about 1882, along there, I should judge.

Q. Or may have been in 1881, I suppose?

A. Yes, it may have been in 1881, or 1882.

Q. Was this cross-over built in connection with that track you spoke of, when the Cincinnati Southern built its tracks on the Western and Atlantic?

A. Yes sir.

Q. That was the cross-over you referred to?

A. Yes, sir.

Q. Were you running the Rockwood accommodation?

A. Yes, sir.

Q. Where is Rockwood, how far is that up on the Cincinnati Southern?

A. It is seventy-seven miles, I think. It is somewhere along there.

Q. This Rockwood accommodation ran between Rockwood and Chattanooga?

A. Yes, sir.

Q. Did you run that in from Boyce Station to Chattanooga over the line that the Cincinnati Southern had built on the Western and Atlantic Railroad?

A. Yes, sir.

216 Q. Do you know anything about any high waters, any floods in the Tennessee River since you have been living here?

A. Yes indeed.

Q. Would they come up to this Cincinnati Southern Railroad on the Western and Atlantic Railroad, where it parallels the Western and Atlantic?

A. Yes, sir, in 1886, over a distance——

Q. What do you recall happened in 1886 in connection with the flood, in what way did the flood do anything to that right of way between Boyce Station and Chattanooga of the Cincinnati Southern where it is on the Western and Atlantic? Did it wash the track out in different places?

A. One place, I think down across from McCallie Avenue, along in there, it turned that track over.

Q. Turned the C. S. track over?

A. I think it did.

Q. Was that anywhere near the National Cemetery?

A. Yes, sir.

Q. How near was it, opposite to it?

A. Well, it was just right above the National Cemetery there, north of it.

Q. What damage did you notice now, that that flood did to the C. S. embankment?

A. Well, it washed it there right considerably. I could not say just how much. I was down there at different times, that is on the side of the hill. My wife was sick here, is the way I recollect it, and I had to look after her, and I know there was one day me and the young lady that was up there to see my wife went on down there and the water was going through at the time, down
217 across that track at the National Cemetery there, there was
about as much water as in ordinary times goes down the Tennessee River.

Q. What was the character of that water, how did *if* move, was it sluggish?

A. No, it went down through there swift.

Q. Did it do anything to the Cemetery wall?

A. Tore down part of it.

Q. Did it do any damage to the part of the embankment that the Cincinnati Southern Track was on?

A. Oh, yes, sir.

Q. What did it do to the embankment?

A. Well, it cut it away, cut away the embankment there in two or three places.

Q. Do you know of any other floods besides that one of 1886, that have washed that embankment of the Cincinnati Southern between Boyce Station and Chattanooga?

A. I could not tell you about the washing point, but floods have come up there and washed over it. I know in fact,—why the last one here, in my recollection, I was out there once when it was over there.

Q. When was the last one?

A. A year ago, I think. Some water, I think, went over it at that time.

Q. What damage did that flood of 1886, do to the Cincinnati Southern track that was on top of this embankment I have been talking about?

A. Oh, I could not give the amount. It done a great deal of damage.

Q. Did you notice the Western and Atlantic right of *was* along in that same place where the damage was done to the Cincin-
218 nati Southern embankment?

A. Yes sir, when that got out, got out of running there, of course I could tell, the Western and Atlantic, of course, what I called "our road" that was the Cincinnati Southern, was south of them a good deal there.

Q. South of what?

A. South of the Western and Atlantic, more or less.

Mr. Colston: You can examine him.

Cross-examination.

By Mr. Wimbish:

Mr. Pennebaker; as I understand it you are a locomotive engineer?

A. Yes sir, for forty-two years.

Q. Have you ever been connected with the operating department of a railroad in connection with the upkeep of the roadway?

A. Well, yes, I think so.

Q. And in what capacity?

A. On the L. and N. road, take that, I ran a construction train there and had charge of the train and the foreman, of furnishing ballast and so on that was put in both on the main line and also the Memphis branch.

Q. When was that Mr. Pennebaker?

A. In '64 and '65, I think, then in '66 they kept a train,—I just tell you I had a train there what was called the construction work train during the summer months I would run on the road and during the winter months, or during the summer months they would give me this train to go out and dig and haul ballast and everything else for that part of the line that was to be put in, in fact from Green River to New River,—I was kind of a supernumerary under the Road Master by the name of McKeen and then I stayed there,—
219 well with regard to that, that is all so far as goes,—well I was on the C. S. when they built that road.

Q. You mean under Mr. Houston?

A. Yes, sir.

Q. In you- experience with the L. and N. did you ever observe the action of high water upon railroad embankments, if so when and where?

A. Well, I don't know of any high water on the L. & N. that we had anything to do with particularly except at Bear River and that wasn't in my hands. There it washed out the bridge and part of the embankment.

Q. Well, are you a civil engineer?

A. No, sir, I am not.

Q. Do you, or not, know that a new green embankment is subject to sloughing off and erosion from high water whether or not there is a current?

A. Oh, yes, sir, they do that.

Q. Do you, or not, know that when an embankment especially when made of clay, becomes firmly settled and has been in place from 30 to 40 years, that high water, in the absence of a strong current, has no such effect on the embankment?

A. That depends upon the material.

Q. I say you take an embankment that is made of clay soil, such as we have between here and Boyce Station?

A. Well, it washed one out here, to show you about that, that was made up there for—I could not tell, you let me see, that must have been there in the neighborhood of four years, right out there at Hixon, yes I guess a little longer than that, before the track was put on it and after the water sunk it, it gave down, two of them, and
that was, I judge that was over—from four to six years before
220 the track was laid on it that that embankment was built
there.

Q. Yes, sir. Have you observed, or do you know, that if the culverts under a railroad embankment are sufficient to carry water through that the rise of water on each side of the embankment is the same in height?

A. Yes, sir, if the culvert is sufficient to carry it through, it is.

Q. And there would be just the same erosion, more or less—no more nor less on one side of the embankment than on the other, would there not?

A. Yes, sir.

Q. Now, in this case where the culvert is insufficient to carry the water through, the rise is much more rapid on the side of the embankment nearest the river, or the point from which the water comes, it rises more rapidly there than it does on the reverse side?

A. Sure.

Q. And if it rises high enough to cover the tracks on the river side and is lower on the opposite side, then it produced a current toward the opposite side of the embankment, does it not?

A. Yes, sir.

Q. The water being higher on one side and lower on the other, there is naturally a current across there?

A. Yes, sir.

Q. Now, if that occurs then the damage to the embankment and track would naturally be greatest on that side of the embankment, would it not?

A. Why, yes, sir.

Q. Now, Mr. Pennebaker, if this flood that you speak of in 1886,
was sufficient to damage the Cemetery wall,—you say it
221 washed it away or damaged it?

A. Damaged it.

Q. What was the extent of the damage to that wall?

A. Oh, I could not tell you that, tore it all down.

Q. That is on the Western and Atlantic side of this right of way and a little beyond it isn't it?

A. Yes, it is across over the tracks on that hill.

Q. Then was that or not, evidence that the current was from the

Cincinnati Southern right of way where the water was highest down towards the Cemetery Hill?

A. Yes, sir.

Q. As it had that effect on the Cemetery wall would it not have had a greater damageing effect on the sloping embankment and track of the Western and Atlantic Railroad.

A. Well, I don't know about that. This water broke through up above there and it came down there with the force that it did, I don't believe hardly there could have been culverts put in there that would have carried it away through there up above. It came down along the side of the C. S. road and then crossed over down there.

Q. How did the most of it come, over from the Cincinnati Southern side to the Western and Atlantic side some where?

A. Why yes sir, it came down from where it broke lose above here, broke over and came down the river and then came right along down to the Cincinnati Southern and broke down here next to the Cemetery.

Q. It broke over the Cincinnati Southern and the Western and Atlantic banks down near the Cemetery?

222 A. Yes, sir, it broke over down there,—well it ran over at different places, but that was the main point.

Q. At this time that you refer to about all this high water, in 1886, and at this place opposite the National Cemetery there where you said the damage was done to the tracks of the Cincinnati Southern, that they were washed up did you observe what damage was done to the embankment of the Western and Atlantic Railroad on its side of the right of way?

A. Well, I don't know, it was tore up there considerably, but I could not tell you the extent of the damage.

Q. Was or was not the damage to the embankment on the Western and Atlantic side actually greater than it was on the Cincinnati side?

A. I could not tell you about that.

Q. Was there any embankment there on the Cincinnati Southern side, at this point?

A. Was there what?

Q. Was there any embankment under the tracks of the Cincinnati Southern on that side at that point, in other words are the tracks elevated above the surface of the ground at that point?

A. Oh—yes,—yes it is filled in there now, it is different from what it was then, you know, the yards put in there.

Q. About that time?

A. Yes, sir, about that time.

Q. How high was that fill, would you say?

A. Well, I judge that fill along there must have been twelve to fifteen feet, I would say.

223 Q. Was it as high on the Cincinnati Southern side as it was on the Western and Atlantic side?

A. I guess, on the Cincinnati Southern side I guess the embankment was not quite as high as it was on the Western and Atlantic side.

Mr. Wimbish: That is all I have to ask.

Redirect examination.

By Mr. Colston:

Q. This Cemetery the wall of which was injured — on the east side of the Western and Atlantic right of way?

A. Yes, sir.

Q. And the Western and Atlantic embankment and the Cincinnati Southern embankment were between the cemetery and the Tennessee River, were they not?

A. Yes, sir.

Q. And this water came out of the Tennessee River up against the embankment that the Cincinnati Southern was on?

Mr. Wimbish: I suggest that that is rather a leading question.

A. That is right.

Q. Do you know whether, in the flood of 1917, that there was Cincinnati Southern embankment north of the Tennessee River that was caved in owing to that flood?

A. When was this?

Q. In 1917?

A. 1917, well, no, I am not sure about that.

Q. You do not remember about that?

A. I am not sure about that, no sir.

Mr. Colston: That is all, you are excused, Mr. Pennebaker.

224 JACOB SMITH, a witness called on behalf of the defendants, having been first duly sworn by the examiner, testifies as follows:

Direct examination.

By Mr. Colston:

Q. How old are you?

A. Sixty-two years old.

Q. Do you live in Chattanooga?

A. Yes sir.

Q. What job are you holding now?

A. I am now working as machinist at the Cincinnati Southern roundhouse.

Q. Are you also a machinist in the shop?

A. I am working in the shop as machinist.

Q. Where is the shop located, as near as you can describe it?

A. Oh, they are right here in Chattanooga.

Q. Yes?

A. They are located now about where they always were since I have known anything about them, that is since 1880.

Q. How long have you known them?

A. I have known them about since 1880.

Q. Did you do any work in the original construction of the Cincinnati Southern Railway, up north of the Tennessee River?

A. I did, I worked on track laying from Ludlow to Lexington.

Q. When was that?

A. That was in 1876?

Q. Ludlow, Kentucky?

A. Yes, sir.

Q. That is on the Ohio River?

225 A. Yes, sir.

Q. Opposite Cincinnati?

A. Yes, sir.

Q. When did you come to Chattanooga?

A. I came to Chattanooga the first year the road opened up in 1880.

Q. Have you been here ever since that?

A. In a manner, yes. I went to work for a while at Rockwood, for the same road, but came in frequently, and worked at Emory Gap some little time, and ran a construction engine out from here, but this was the headquarters for me then.

Q. Did you run over the road as fireman or as Engineer?

A. I did as fireman and engineer, yes, sir.

Q. That was before you became machinist?

A. Yes, sir.

Q. When did you, what did you act as when you commenced working as machinest?

A. I don't know, I could not say.

Q. How long after you came to live in Chattanooga?

A. Well, I came here in 1880, and I worked in Rockwood, I think, for two years, or so, when they moved the Division to Glen Alice and I worked there four or five months, till they moved back to Rockwood, and then I went over there—the first work I did when I came down here in 1880 was working on the track, laying the track working on the Cincinnati Southern over there, was foreman and assistant foreman.

Q. Where was that?

A. Right here in Chattanooga that was in 1880.

226 Q. Now, when you first came here were the C. S. cars running into Chattanooga on the rails of the Western and Atlantic?

A. Yes ,sir, when I first came here it was.

Mr. Wimbish: Isn't that one of the things — that contract, that you propose to stipulate, that they came in for a certain length of time over the rails of the Western and Atlantic?

Mr. Colston: Yes.

Mr. Wimbish: Isn't that the best evidence?

Mr. Colston: Perhaps it is, except that I want to connect this up.

Q. Did they run then into the Union Depot on 9th street, the 9th Street passenger station?

A. Yes, the passenger trains did.

Q. Do you remember when, or do you remember the fact that the Trustees of the Cincinnati Southern Railway built their own independent line from Boyce Station into Chattanooga on the right of way of the Western and Atlantic?

A. Well, sir, I know it was built, I don't know who built it.

Q. Well, when you came to Chattanooga, in 1880, were there any Cincinnati Southern shops or roundhouse under construction?

A. The roundhouse and shops were both under construction.

Q. In 1880?

A. Yes, sir, the first year.

Q. Located on the same ground they have since been located on?

A. Yes, sir.

227 Q. Did you take any part in laying any rails to the round house?

A. Yes, sir.

Q. On which side of the Western and Atlantic track were they when you come from Boyce Station to Chattanooga this roundhouse and those shops?

A. This roundhouse?

Q. Yes?

A. On the East side.

Q. So that when the Cincinnati Southern built an independent line on the right of way of the Western and Atlantic from Boyce to Chattanooga, they had to cross over in order to get to this roundhouse?

A. Yes, sir.

Q. Cross the Western and Atlantic track?

A. Yes, sir, to get to the roundhouse.

Q. Have you ever, during the time you have lived in Chattanooga, seen any high waters up on this embankment of the Cincinnati Southern between Boyce Station and Chattanooga?

A. Yes, sir.

Q. Do you remember about the flood of 1886?

A. Yes, sir, I remember of that big flood we had here at one time and every body told me it was 1886, yes, sir, I do.

Q. What do you remember about that?

A. Well, I remember that was to *be* best of my knowledge, some few inches in the roundhouse. I had charge of the C. S. roundhouse at that time at night.

Q. Did you get out on the road at all during that flood to see what it was doing?

A. No, sir, I was not called out.

228 Q. Do you know whether traffic was stopped between Boyce and Chattanooga in consequence of that flood?

A. I do,—it was stopped.

Q. But you did not go out to examine the embankment to see what damage, if any, was done?

A. No, sir but I can say because there, between Boyce and Chattanooga the water was up there and the traffic was stopped at that time during the flood some, as to how many days I could not say.

Mr. Colston: You can examine him.

Mr. Wimbish: I have no questions.
Mr. Colston: You are excused, Mr. Smith.

R. B. STEGALL, a witness called on behalf of the defendants, having been first duly sworn by the examiner, testified as follows:

Direct examination.

By Mr. Colston:

Q. Will you state how old you are?
A. I am seventy-five.
Q. Are you in the employ of the Cincinnati, New Orleans and Texas Pacific Railway Company?
A. With the Southern now, yes sir.
Q. How long have you been in that employ?
A. Thirty-nine years.
Q. Will you give the date when you began?
A. The 10th of November 1878.
Q. Do you remember the time when the Cincinnati Southern came in from Boyce to Chattanooga over the rails of the Western and Atlantic,—do you remember that fact?
A. I remember that fact. I was yard master for the A. G.
229 S. Railroad at that time.
Q. Yard Master in Chattanooga?
A. Yes sir.
Q. Do you remember when they started building shops at Chattanooga for the Cincinnati Southern Railroad?
A. Not definitely. I know when they were built, but I had no occasion to take any note of it. I think it was about 1880.
Q. Where were those shops located with reference to where they have been located ever since?
A. Why, near where they are now.
Q. Do you reme-ber about a cross over being built from the Cincinnati Southern Railroad to those shops or to the other shops of the Cincinnati Southern at Chattanooga?
A. Yes, sir, it was considerably this side.

Mr. Wimbish: I suggest, Colonel, that that is all cumulative, haven't you shown by two witnesses the condition as to the crossing there?
Mr. Colston: Let me finish this and I will take your warning. Please read the question.

Question read by stenographer as follows:
"Q. Do you remember about a cross over being built from the Cincinnati Southern Railroad to those shops or to the other shops of the Cincinnati Southern at Chattanooga?"
A. Yes, sir, this side of the present cross over.
Q. That is meaning to say it was toward Chattanooga from the present cross-over?
A. Yes, sir.

Q. The present cross-over referred to in what is called the interlocker, about East End Avenue?

A. Yes, sir, going into the new terminal station.

230 Q. Were you ever in the employ of the Western and Atlantic?

A. I was in the employ of the Western and Atlantic about fifteen years, up to about *to about* 1878.

Q. What were you doing?

A. I was running a train, the last work.

Q. Well, were you ever yard master at Dalton for the Western and Atlantic?

A. Yes sir.

Q. Also transfer clerk, for that Company?

A. Yes sir.

Q. Do you remember the year 1886?

A. I was living here, yes sir.

Q. Do you reme-ber there being any flood in that year?

A. Yes sir.

Q. Will you tell the Court just what that flood did in regard to coming up on the embankment and tracks of the Cincinnati Southern and the Western and Atlantic tracks?

A. Well, of course now, I could not tell anything about how deep it was until afterward, but it had gone over the tracks all the way from Boyce to Chattanooga, both lines of track from Boyce to Chattanooga, that is, I wasn't at Boyce, but I understood it reached clear back to Boyce.

Q. Well now, do you know any place about opposite the National Cemetery where that flood of 1886 did damage to the embankments of the Railroad?

A. Yes sir.

Q. Where was it?

A. Where the Cemetery Hill on the other side of Eleventh street on the north side, forced the body of water into a current
231 there that did considerable damage, washed the C. S. track over onto the Western and Atlantic.

Q. Well, now you speak about a current, was there a current there in the water, how was the water, was it eddy or still water?

A. The water was obliged to have been a current sir, it could not have lifted that track out and put it over on the W. and A. Track.

Q. Well, was it swift or was it otherwise?

A. Well, now I wasn't there, I only saw the effects,—I couldn't tell you.

Q. State fully what effects you saw?

A. Yes, sir, that was it.

Q. You state that is what effects you saw, what did you see as to the effects?

A. It washed the C. S. railway tracks over where the W. and A. was.

Q. What did it do to the W. and A.?

A. Well, the W. and A., I am not positive, it washed the W. and A. possibly a little ways, but a very short distance though.

Q. Which suffered the more?

A. Oh, the Cincinnati Southern suffered the most.

Q. That got the first brunt of the flood, did it?

A. Yes, sir, it got the body of the water that was coming down on the other side and when it crossed over and got out in *from* of the National Cemetery, the water was higher on yonder side, on the east side because the flood hadn't got down around behind to level up.

Q. You say the water was higher on the east side, do you mean the east or west?

232 A. I mean all this cut, the two ridges, where the two ridges went there, the water was higher all the time back there than it was below and consequently made a greater current.

Q. Was the water higher on the Cincinnati Southern side?

A. No sir, I mean it was higher on the east side, this cut between the two ridges, it was righer there and was forced this way. Of course it had not risen up on this side for possibly a foot or two of the lower side. The water came north out of the river (indicating) this way, then got out around here to level up.

Q. Was the water or not, the same height on both sides along the Cincinnati Southern embankment.

A. No sir.

Q. The Cincinnati Southern embankment stands between the Tennessee River and the Western and Atlantic embankment?

A. I don't get your drift.

Q. Question read by stenographer as follows:) "The Cincinnati Southern embankment stands between the Tennessee River and the Western and Atlantic Embankment?"

A. Yes sir, Oh yes.

Q. Where does this water come from?

A. It comes from the Tennessee River.

Q. Then it hits the Cincinnati Southern embankment first?

A. Yes, sir.

Q. Do you know anything about the flood of 1875?

A. I was not here, I didn't come here until 1878, but I understood——

Mr. Wimbish: We object to this hearsay on that.

233 A. (Continuing:) This last flood that we spoke of, I understood that the flood of 1875, was five foot higher *that* this one was. I didn't know anything about it. I was at Dalton working for W. and A.

Q. Did you hear that from reputation from talking with the people?

A. Yes sir.

Mr. Wimbish: We object to the testimony as he was not here. It is purely hearsay.

Mr. Colston: I submit it on the question of reputation.

Mr. Wimbish: And I object to it on another ground; that there is higher and better proof in the records of the Signal Service at Chattanooga.

Mr. Colston: You can examine the witness.

Cross-examination.

By Mr. Wimbish:

Q. You say you have been employed by the Cincinnati Southern at Chattanooga, Mr. Stegall?

A. Yes, sir.

Q. In what capacity?

A. I am local car accountant for the Company, have been for thirty years.

Q. But you say you are now employed by the Southern Railway?

A. Well, the Southern took over the C. N. O. and T. P. and I just worked right on.

Q. You are working now for the Southern Railway System?

A. Yes, sir.

Q. Speaking of this high water in 1886, did that cause any damage to the embankment and tracks of the Western and Atlantic Railroad beyond Boyce?

234 A. I couldn't tell you because I wasn't out there, but I never heard that it did,—if I did, I didn't make any note of it in my mind, never expect to have that to be called for anyhow.

Q. You were not, as I understand it you weren't there during the high water, but subsequently went out to see the damage it had done down between Chattanooga and Boyce?

A. Yes, sir, went out to the Cemetery. I didn't go beyond that.

Q. How do you know if there was a current there, Mr. Stegall?

A. The tracks would not have been lifted, with the rails on it without a strong current.

Q. That is a conclusion of yours from that fact?

A. A conclusion of mine, yes sir, and I think it is justifiable.

Q. Possibly so, and possibly it is only a conclusion and not a fact that you know of your own knowledge?

A. Yes sir.

Mr. Wimbish: That is all I care to ask him.

W. H. Ray, a witness called on behalf of the defendants, having been first duly sworn by the examiner testifies as follows:

Direct examination.

By Mr. Colston:

Q. Mr. Ray do you live in Chattanooga, Tennessee?

A. I live at Boyce.

Q. Are you in the employ of the Cincinnati, New Orleans and Texas Pacific Railway Company?

A. Yes, sir.

Q. What branch are you in?

235 A. The car Department

Q. How long have you been in the car department branch of the Company?

A. Thirty-four or five years.

Q. Can you give the date when you commenced?

A. June 3d, 1883, I think it is, if I am not badly mistaken.

Q. Do you know anything about the high water of 1886?

A. Yes sir.

Q. Tell the Court what you know about it here at Chattanooga and what it did to the Railroad, if anything?

A. Well, it did considerable damage, that is to look at it, I made several trips over in a boat into Chattanooga from the Camp, between the telegraph poles, that was my guide as I came down from Boyce. Just near Boyce there, near that little factory plant there at Boyce where we use to keep our boats tied and that water broke over there and did considerable damage to the Southern and that is what I think, what made the bad flood and did so much damage to the C. N. O. and T. P. and other roads in there.

Q. You say you came down between the rows of telegraph posts?

A. That was my guides.

Q. Those telegraph posts along the railroad?

A. Both lines, both sides.

Q. What railroads?

A. The Western and Atlantic and the C. N. O. and T. P.

Q. It was over this piece of road between Boyce and Chattanooga?

A. Yes, sir, it was something over nine feet at—nine feet
236 six inches by the Rockeye. I had to stoop over coming in in the boat.

Q. Do you know anything about what happened to the C. N. O. and T. P. embankment along about the National Cemetery.

A. Well, *is* passing there I seen the track rather washed up against and on top of the Western and Atlantic and a considerable amount of trash and stuff there, lumber and one thing and another, piled up on the track along there.

Q. Do you know whether the Cincinnati Southern embankment along there served as a protection to the Western and Atlantic Embankment?

A. I would think so yes sir.

Q. Where did the water come from when it first came in, what river, from the Tennessee River?

A. The Tennessee River, yes, sir.

Q. How did it come in there?

A. Why, it came in from the west and broke over there at the Southern Railroad over the lakes and everything and there was about two hundred feet of the Southern Railway there that looked *line* a fence with the ties standing up there.

Q. This water came up what ravine, do you know, from the Tennessee River?

A. Came up what we know, what we call Tanners Flat Branch used to be known as Vincent Branch.

Q. That is a kind of hollow or ravine, isn't it?

A. Yes sir.

Q. Well, how much damage did the embankment of the Western and Atlantic Railroad suffer as compared to the damage that was done by the floods to the embankment of the Cincinnati 237 Southern, which was the most?

A. The Cincinnati Southern of course, seemed to be the most, now I never went in past—I was passing in a boat in below there, you know and as the water fell I could see it. The water ran the tracks up against it and on the Western and Atlantic track. I didn't go out there to examine the extent of the damage, of course.

Q. But you could see it and judge of it by the eye, could you?

A. Yes sir.

Q. Well, have there been other floods along there that you know of, that weren't so high as the flood of 1886, but which came up to the embankment of the Cincinnati Southern?

A. In nineteen and—Well I could not say that, though, because I was in Florida last winter, a year ago, I was not here in that flood of 1917.

Q. 1917?

A. Yes, sir.

Q. Well, now, as between 1886 and 1917, was there any high water that came up and struck the embankment of the Cincinnati Southern between Boyce and Chattanooga, if you know?

A. Well, not that I know of, no sir. But coming in and out on the electric car, I could see back water, riding the electric car, you know, I could see back water in on those flats and ravines along in there, but whether it got over their track or not, I could not say.

Q. You did not come in over the railroad, in those times?

A. No, sir.

Q. You came in on the electric cars?

238 A. Yes, sir.

Mr. Colston: That is all.

Cross-examination.

By Mr. Wimbish:

Q. Mr. Ray, you said in your opinion, the Cincinnati Southern embankment was a protection to the Western and Atlantic?

A. Yes sir, that is my opinion.

Q. In what way was it a protection.

A. Well, in the way of a levee, I would say. If I was going to protect anything I would build a levee.

Q. You think it was a protection because it was on the side from which the water, the high water comes?

A. Yes sir.

Q. And in your opinion would naturally protect as a levee or dam protects?

A. Yes sir, an abutment.

Q. An abutment or embankment?

A. Yes, sir.

Q. Have you any other reason for your opinion that the Cincinnati Southern embankment was a protection to the Western and Atlantic?

A. Only by sight, as to seeing that the Cincinnati Southern seemed to be damaged considerably more than the Western and Atlantic is the only reason.

Q. You refer to 1886?

A. In 1886, yes sir. That is all I know anything about.

Q. Your examination, as I understand you, was casual?

A. Just in passing, saw the track on the tracks there.

239 Q. You were employed by the Cincinnati Southern at that time?

A. Yes sir.

Q. Then you were naturally more interested in the Cincinnati Southern than in the Western and Atlantic?

A. Well, it struck my attention that our track as we called it, was over on the Western and Atlantic.

Q. Did you examine the Western and Atlantic side to see whether the flood had damaged it or not?

A. Only as I said in passing.

Q. In your opinion the Cincinnati Southern was more damaged that the Western and Atlantic?

A. Yes, that is my opinion.

Q. How do you think that occurred at that time, that that could have been more damaged than the Western and Atlantic?

A. Well, the track being over on the Western and Atlantic and the wreckage of rubbish and lumber was all on the Western and Atlantic track.

Q. As I understand you the water rose enough to go over both tracks?

A. Oh, yes.

Q. Then when it got over both tracks to what extent then was the Cincinnati Southern a protection to the Western and Atlantic?

A. I could see that it was a great deal more—when it would pass over it hit on the W. and A. track it would pass over the W. and A. tracks, the water would, would be my judgment.

Q. If these ties and rails of the Cincinnati Southern were turned
up and other drift came along with them why it would come
240 with greater force over the track of the Western and Atlantic
would it not, come with added force?

A. Well, now right after the W. and A. track there was considerable fall about the place and the—you see there of a slough in there, that water is standing in there now I suppose three or four feet deep, standing in there now along by the Cemetery wall fifty of sixty feet, standing in there now, or was yesterday.

Q. As a practical man and as an observer of such things, would it not be true when you get a head of water such as they had in 1886, that rose above this embankment that when it came to the other side and it rushed down, the current would be greater there than it would be any other place, you have got a level head of water and you have got a slough, a lower place, there, would it not rush down?

A. If it had much fall I should think so, yes sir.

Q. Would not the tendency be to produce greater damage to the Western and Atlantic than to the Cincinnati Southern?

A. Well, it could not do so much if that track was over on the W. and A. track there, and rubbish was on the track there.

Q. Then you say in your opinion resulting from observation, that you think more damage was done in that flood of 1886, to the Cincinnati Southern embankment than to the Western and Atlantic?

A. Yes, sir, that is my opinion.

241 Q. The Cincinnati Southern was a new embankment at the time, practically?

A. Yes, sir.

Q. And the Western and Atlantic was fifty years old, was it not?

A. Well, I don't know, I wasn't here.

Q. As you state the greater damage was done to the Cincinnati Southern than to the Western and Atlantic, wasn't that due to the fact that the Cincinnati Southern was a new embankment?

A. That side was, the Cincinnati Southern was practically a new embankment, of course.

Mr. Wimbish: That is all.

242 Redirect examination.

By Mr. Colston:

Q. How long had the Cincinnati Southern embankment been there in 1886?

A. I could not answer that naturally, because I came here in 1882.

Whereupon the hearing was adjourned at one o'clock until two fifteen P. M.

Chattanooga, Tenn.,
March 22nd, 1918.

Pursuant to adjournment hearing proceeded at 2:15.

William Doyle, a witness called on behalf of the defendants, having been first duly sworn by the examiner, testified as follows:

Direct examination.

By Mr. Colston:

Q. What age man are you?

A. Fifty eight past.

Q. Are you in the employ of the Cincinnati, New Orleans and Texas Pacific Railway Company?

A. I am, yes, sir.

Q. How long have you been in the employ of that company?

A. Since the second day of April 1881.

Q. Do you remember seeing the grading being done of the Cincinnati Southern track or tracks on the Western and Atlantic Railroad right of way between Boyce and Chattanooga?

A. Yes sir.

Q. About when was that?

A. That was in—I was here in 1882, I was employed with the gang that put in the bridge out here at Rockeye when they changes
243 it from a single track structure over to the new main line which was then being graded.

Q. You mean the new main line, the line used by the Cincinnati, New Orleans and Texas Pacific ever since?

A. Yes, sir, the C. N. O. and T. P.

Q. Right along side the Western and Atlantic when that grading was going on did you see any shop building being built?

A. The shops were being built in Chattanooga.

Q. At the same time they were making this change?

A. Yes, sir.

Q. Where are they now?

A. Right in the same place.

Q. Right in the same place they have been ever since?

A. Yes, sir.

Q. Did you notice the cross over that was provided for getting across the Western and Atlantic down in Chattanooga from the West side over to the East side of the Western and Atlantic?

A. Yes sir.

Q. Whereabouts was that cross over located?

A. About a thousand feet south of the tower now. There was a little tower built there for handling and the switching.

Q. The tower now is at East End Avenue?

A. Yes, sir.

Q. That is where the present crossing is?

A. Yes, sir, the present crossing now.

Q. That is how far from where the crossing was?

244 A. Just about a thousand feet north.

Q. Towards Chattanooga?

A. Yes, sir.

Q. Have you ever seen any high waters or floods between Boyce Station and Chattanooga along this right of way of the Cincinnati Southern and the Western and Atlantic?

A. Yes, sir, I have seen two of them.

Q. What two do you have in mind?

A. 1886 and 1917.

Q. Taking the 1886 flood, what can you say about that?

A. Well, I remember coming over that from a point possibly quarter of a mile south of the crossing at Boyce Station, the water was over the tracks and we taken a boat from there and came in following the line of the telegraph poles down there and crossed where the yards are now into the old Staunton House grounds where the Terminal Building is now.

Q. The Staunton House was located on the same ground that the present Cincinnati Southern passenger terminal station is?

A. Yes, sir.

Q. Those telegraph poles that you mentioned were they on each side of the right of way of the Western and Atlantic and the Cincinnati Southern?

A. Yes, sir.

Q. Then you came down in the boat along the right of way?

A. Yes, sir, right along the right of way, right over the tracks.

Q. Well, did you ever see any damage that was done by 245 that flood to the Cincinnati Southern embankments?

A. No, sir. I left here before the water went down, we went to Cave Springs before the water went down.

Q. Have you ever walked over the tracks after the water had gone down, between Boyce Station and Chattanooga?

A. Well, yes sir, I did last year, 1917.

Q. What *a*ffect did that flood have?

A. It was over the tracks, but with the exception of washing a lot of rubbish over the West side over onto the tracks, why there was scarsely no damage done.

Q. Well, from your observation what would you say as to whether the Cincinnati Southern embankment, along between Boyce Station and Chattanooga, protected the embankment of the Western and Atlantic, operated as a bulkhead as a protection for the Western and Atlantic on that portion of the right of way?

A. It seems it was a big protection, it filled in the low ground there, which was probably anywhere from ten to twelve feet below the base of the rail, filled that up, making practically a bulkhead all the way down parallel to the W. and A. Tracks.

Q. This water comes in from the Tennessee River?

A. Yes sir.

Q. Backs up and hits the Cincinnati Southern embankment first, does it not?

A. Yes, sir, comes over just south of the old Citico Furnace there, there is a low place there.

Q. When you went down there in that row boat what was there as to current?

A. There was a considerable current.

246 Q. What direction was the current?

A. The current was flowing to the west.

Q. A kind of cross current, then, was it?

A. Yes, sir, towards the Cemetery.

Mr. Colston: You can examine him.

Cross-examination.

By Mr. Wimbish:

Q. As I understand you in 1886, you say this water, when it was at a stage over these tracks you came over it in a boat from Boyce Station to Chattanooga?

A. Yes, sir.

Q. And you left before the water subsided?

A. Oh yes.

Q. You saw the flood of 1917?

A. Yes, sir.

Q. And the water was then also over the tracks.

A. Well, just barely over the rail.

Q. Do you know how much higher the flood of 1886 was than that of 1917?

A. Well, no, I could not say. You could not run a row boat in 1917 down over the tracks, but in 1886, there must have been eight feet of water,—well, between five and six feet I should say.

Q. You heard those witnesses this morning who testified about the water of 1886, that considerable damage was done to the embankment of the Cincinnati Southern and the tracks of the Cincinnati Southern did you not?

A. Yes sir, I heard that testimony, but as I say the water was still up when I left here. I couldn't see anything about that.

Q. I know, but you heard the testimony?

A. Yes, I heard the testimony.

247 Q. Taking it now to be true that there was quite considerable damage done to the embankment and tracks by the flood of 1886, and, as I understand you, very little damage was done in 1917, why wasn't as much damage done in 1917, as in 1886?

A. Well, there has been possibly eight or nine more tracks put in now and that low ground has all been filled up, as you work out towards East End avenue it is filled up in there. Of course, naturally filling up that low ground.

Q. Was it due in any degree to the fact that in 1886, the Cincinnati Southern embankment was new and in 1917 it had become settled?

A. Naturally, I suppose it was in there possibly six *of* seven years.

Q. Now, the Western and Atlantic tracks were in the same location in 1886, and 1917, along their right of way?

A. Yes, sir.

Q. And their embankment was about the same?

A. Yes, sir, I would suppose it was widened out some.

Q. But there was little or no damage done to that embankment in 1917?

A. No, I could not say there — any done.

Q. Can you explain why such damage should have occur-ed in 1886, to the tracks and embankment of the Cincinnati Southern Railroad, when no such damage occur-ed in 1917?

A. No question it was from the fact that the low ground had been filled up, and further north toward the Rockeye there was a big body of water coming down the Western and Atlantic side, filling up the low ground on the east side before it got up down on the
248 lower end of the yard. That is the place where we call the Rockeye where it crossed the Western and Atlantic and the water came around and filled up the low ground on the east side.

Q. The east side is the side next to the Cemetery?

A. Yes, sir, that, of course, acted as a protection against any rush of water, while on the other hand, you take the Citico Furnace they have filled out that low ground around south of the furnace with slag, making a strong bulkhead there so that the water had to come over the tracks from the north and come around what is now known as the Big Arch under the Southern Railway tracks, just south of the Southern Crossing.

Q. Not being sufficiently familiar with the ground I don't know that I quite understand, but see if I understand, please, that in 1886 the water came in between the Western and Atlantic embankment and Cemetery hill, along there?

A. Yes, sir.

Q. And filled that up that is your contention, filled that up with water?

A. Yes, sir.

Q. If that is true, what was the difference in the level of the water that came over the tracks of the Cincinnati Southern and the Western and Atlantic in 1886, and the level of the water in this low ground between the Western and Atlantic and the Cemetery, higher or lower than it was in 1917?

A. Well, i*f* was practically the same when I came over there, as well as I can remember, the east side was filled up, as well as I can
recall it now, perfectly level, but there was a strong current
249 going through, and if I am not mistaken, it went around the
back side of the Cemetery and came on down over into Montgomery Avenue and came down through there, that made a low outlet for the water over there and made quite a current across over in between McCallie Avenue, where the viaduct is now, and the Cemetery.

Q. In order for the River to get on that side of the Western and Atlantic it had to cross the embankment somewhere?

A. Oh, yes,—well unless it went through the numerous culverts in there.

Q. Yes, and it came from this side an*y* got over the other side?

A. Yes, sir.

Q. And that was also true in 1917?

A. Yes, sir, but not at that point. As I say, at the old Citico Furnace, they filled up all of that low ground between the river and the furnace so that cut off that low channel which left it open for the river to go down through there and forced it on the upper side, and it came down where under the fill is the Southern Railway Big Arch, through the Big Arch and came down through there and down on the east side of the W. and A. and filled up that bottom in there, and did not injure the Cemetery wall. Before it overflowed the tracks down McCallie Avenue.

Q. Then the higher the embankment the more it acted as a bulkhead and great- the accumulation of water on the river side?

A. Yes, sir.

Q. That being true, then the greater would be the current that
rushed through there from one side to the other?
250 A. To the other, yes sir.

Q. The building the Cincinnati Southern embankment did not elevate it at all, did it?

A. Well, no. As I say, as well as I can recall now my trip down there, the water was filled up about the same on both sides, but the flood of 1917, the water did not rush across there, but rose up and by the time it raised over the tracks, on a level with the tracks at McCallie Avenue, and between that and the Cemetery, that low ground was filled up with water so it just made, just flowed across there and it was filled up because it was coming in from further north.

Mr. Wimbish: That is all I have.

Redirect examination.

By Mr. Colston:

Q. Did I understand you to say that in 1882, you remember seeing that grading from Boyce to Chattanooga for the Cincinnati Southern track, or was it in 1881?

A. 1882,—in 1882 we changed that bridge from a little pony Howe Truss to a through girder bridge.

Q. You didn't make any memoranda or any data about it as being 1882?

A. No, I know it was the following summer after I went to work on the road.

Q. So it is your opinion that this Cincinnati Southern embankment operates as a protection against floods to the Western and Atlantic?

A. Undoubtedly. I consider it is a big protection.

Mr. Colston: That is all.

Mr. Wimbish: I would like to ask Mr. Doyle one question that I omitted.

251 Recross-examination.

By Mr. Wimbish:

Q. When the Cincinnati Southern was first graded to connect with the Western and Atlantic Railroad, did they do any grading from what is now Boyce Station to a point of connection with the Western and Atlantic beyond the present Boyce Station, a road way that was never used?

A. Oh yes, that is quite a distance, about three quarters of a mile or more north of the present station now.

Q. Do you know why that road way was graded from the Cincinnati Southern to that point on the Western and Atlantic?

A. No, sir, I do not.

Q. Do you know why its use was abandoned?

A. Well, when they—they built this new line paralleling the W. and A. from Boyce in.

Q. And when they built that they abandoned the idea of using the road way they first intended to use?

A. I suppose that was the idea of it.

Mr. Wimbish: That is all.

Mr. Colston: You are excused Mr. Doyle.

James Hickson; a witness called on behalf of the defendant having been first duly sworn by the examiner testifies as follows:

Direct examination.

By Mr. Colston:

Q. How long have you been—since what year have you been living in and about Chattanooga?

A. Well, sir, I have been living here continuously I guess, since the latter part of 1863, or 1864, and I had been in and out of Chattanooga before that. 252

Q. Do you remember anything about there being a flood in 1875?

A. Yes, sir.

Q. What could you say about that flood, where was it?

A. Well, it was all over the country here.

Q. Was it over the Western and Atlantic Railroad?

A. Yes, sir.

Q. Was it up against the Western and Atlantic Railroad?

A. It ran over it.

Q. What?

A. It covered it over.

Q. Do you know whether it did any damage to the Western and Atlantic right of way or not?

A. Yes sir.

Q. Did it do much or little?

A. Well, considerable, I don't know how far, right there between this hill we call Park Hill and the National Cemetery right in that gap there, as it is, I remember after the flood of being out there and seeing the tracks where the flood had done washed out from under it and it swayed down and the ties washed up on the right of way and all, and of course I looked at it like anything else of interest, to see this thing like that way.

Q. How does the water in times of flood, get from the Tennessee River up on and against this railroad embankment, which way does it come?

A. Now, first it flows in and backs up from around down south, and the river backs up in there and *and* all this water down 253 in here, the majority of it is what you call eddy water until it gets a head at Citico, then it comes down through by the Ball Park, comes down through there and then when it gets high enough to break over the W. and A. Railroad there,—the W. and A. Railroad at that time, there wasn't but the W. and A. road, there in 1875,—the W. and A. railroad was built with what they call borrowed dirt to make them fills there. Well, I guess this W. and A. Railroad along about that time, well, I would say that Railroad right of way is fifty feet, twenty-five feet from the center of the track each way, but when the railroad was built, it was kind of narrow, wasn't very wide, may be twelve or fifteen feet on top where the ties were, just room for the ties, and a little room for you to walk on outside of the ties, so when the water came in there, that was soft dirt and naturally washed away between the ties, I suppose it was four or five feet higher than the railroad at that time and pieces of drift wood would catch over there and stick, and I went out—and went into the river down here two miles, and the reason I know that I went out there and took a little boat and I got me raft of wood with some ropes and I brought it across on my father's lot on C— Street, brought it right across the East Tennessee Railroad as it was then, right where the power house is now. That is the way I happened to be out there and saw that current.

Q. Where was that currect with reference to the Western and Atlantic Railroad?

A. Well, it was between the Cemetery and the Park.

254 Q. Was it next to the Western and Atlantic embankment?

A. It was right across the railroad.

Q. The Citico Furnace, that is on the West side of the Cincinnati Southern track now?

A. Yes, sir, there was no tracks then.

Q. I say where it is now?

A. Yes, sir.

Q. Do you know anything about the flood of 1886?

A. Yes, sir, I was here. It wasn't as high.

Q. Was that as high as the flood of 1875?

A. No, sir, it wasn't as high. I forget what height it was but it wasn't as high.

Q. What can you recall about that flood of 1886, with reference to these railroad embankments, the W. and A. and the C. S. between Boyce station and Chattanooga?

A. I don't think that done the damage the one previous to that, did not get as high.

Q. What do you know of its doings, in the way of damaging if any?

A. Well, it washed out there and got drift wood in there and got the track out of line some, it had to be repaired.

Q. What is your opinion as to whether the Cincinnati Southern embankment located between Boyce Station and Chattanooga operates as a protection to the Western and Atlantic Railroad from floods?

A. Sure it is in my opinion, they filled in all that low ground there and there had been a kind of rivalry there among the 255 section men on this division for a good many years since the Cincinnati Southern had been there, and the Cincinnati Southern covers and tamps a piece and raises it up a bit and then the W. and A. comes the next year and they fill up their road a little above the Cincinnati Southern and consequently they raise it pretty high along there. I don't know that it would go over there now. I am not an engineer but from the looks of the road I don't think it would do any damage there now.

Q. What business have you been in during your life time?

A. Well sir, I am a machinist and I have worked for all these roads. I drove carts for the old East Tennessee road before the road was built, at Knoxville in 1856 and 1857, and I worked for them here in the shops since I learned my trade.

Mr. Colston: You can examine him.

Cross-examination.

By Mr. Wimbish:

Q. Suppose the Cincinnati Southern Railroad had been built on a right of way immediately adjoining that of the Western and Atlantic, from Boyce Station to Chattanooga instead of joining it, built on its own right of way, would that have afforded as much protection to the Western and Atlantic Railroad as the way in which it was built?

Mr. Colston: Objected to as irrelevant and immaterial.

A. I don't know about that. I couldn't tell you, you mean if the Cincinnati Southern was built and not joined not up against the W. and A.?

Q. Yes?

A. Why, I think it would do more damage if it was, it would allow the water to get in there.

256 Q. What water?

A. The water that came, allowed it to get in between the Cincinnati Southern and the W. and A. and consequently put more pressure against the W. and A.

Q. As I understand the water that gets up in there first is back water from South River?

A. Yes, sir.

Q. And is eddy water?

A. Yes, sir, all eddy water.

Q. And until it gets to a height practically of the tracks, is that right?

A. Yes sir.

Q. There is no inflow from the river side?

A. No, sir.

Q. Well, suppose that the Cincinnati Southern Railroad had been built on its own right of way, with a necessarily wider embankment at the base, until the water got high enough to go over that, it certainly would be a protection, would it not, to the Western and Atlantic Railroad?

A. Well, I am not hardly able to answer that question, but common sense tells me this: If the Cincinnati Southern was built off there, not connected up, not filled in up to the W. and A., when this water would break over the Cincinnati Southern Road into this vacant place, it would have more danger than it has now.

Q. That would be true, though, what would be the effect, but as I understand it, this water comes in and fills this all up before the direct current breaks over?

A. Yes, sir.

Q. And when that breaks over this space would be already filled?

I mean the eddy water and back water backs up from the
257 south side over the W. and A. and between there and Cemetery hill until it gets enough to break over and then when it breaks over it then forms that current.

A. Yes, sir.

Q. I am speaking about suppose the space between, the space that would have resulted between the Western and Atlantic and the Cincinnati Southern embankments if the Cincinnati Southern had built on its own adjacent right of way, now before the water could break over this intervening space would have been filled with back water?

A. I expect it would.

Q. Before there was any current, and would not that bank of still water have been fully as much protection to the Western and Atlantic as the present embankment of the Cincinnati Southern is?

A. I don't think so.

Q. Why not?

A. Because they filled in away back yonder above at the furnace, they used the slag and any thing to fill in, and the rails and ties on it, and all would be good protection it seems to me.

Q. I am speaking about the time when the Cincinnati Southern was built and the flood of 1886, not how the situation may be now, but at that time, if the Cincinnati Southern had built on its own right of way, would it not have protected the Western and Atlantic just as much as built like it was?

A. I stated that it would if the water did not get high enough to come over, I stated it would have been the same both ways but if it had, that would form a current there and wash out that would
258 be damaged.

Q. Speaking about the flood of 1875, I understand you had no particular interest in the railroad, you simply viewed it casually?

A. Yes, sir.

Q. You went out, you say, went out in a boat along there and made a casual examination?

A. Yes, sir, I had no interest in it.

Q. And you spoke of seeing a wash out there?

A. Yes, sir.

Q. On the embankment of the Western and Atlantic Railroad.—where was that wash out?

A. Well, sir, as close as I can tell you now it was north of East End Avenue, there was a curve around there and I guess it is at least 500 feet north. Now I would not be in a 100 feet of that, but 500 feet north of East End Avenue is were the biggest appeared and this fill was on the W. and A. in 1875, it is, the ground was lower right in that place and an old fashioned culvert built out of rock took any flood of ordinary rate, and that part of the embankment was stronger *that* anywhere else on account of that hollow.

Q. On which side of the railroad was this wash out, the river side *of* the Cemetery side?

A. Washed right through the railroad, the water ran right through.

Q. Under the culvert?

A. Yes,—no over the culvert.

Q. I mean about the place the culvert was?

A. Yes, sir. I don't know how much wash there was, I seen the men there putting it back.

Q. That is what I want to know, how much wash out there was and I would be glad if you could refresh your memory and 259 tell me how wide it was and if it broke the embankment fully in two?

A. I don't know, but I think the wash out there was something—right there about the place where that low part is, I think it was something near one hundred feet.

Q. You mean that width?

A. Yes sir.

Q. Was the fill washed out the whole of it?

A. Yes, the track was tore *lose*, in places upset this way (indicating with hand) and the ties were and some drift wood, and some of the dirt was gone.

Q. What I want to know is how much of the dirt was gone?

A. Not all of the dirt, just some of it.

Q. Just washed out the top?

A. Yes, sir.

Q. About how much?

A. Well, I don't know, ten feet I suppose from the original top of the rail down, the dirt cut out.

Q. Was there any wash out on the track of the embankment below that?

A. No, sir, I don't think so.

Q. On either side?

A. No, sir, I don't think there was on either side, except at that place where it cut through, right in the sink, in this wash where it was swift.

Q. Is that the only place it washed out in 1875?

A. That is the only place I know of. There might have been some other place, but I don't think there was, because that Citico place there, this water got through there and along the hill, the Ball Park, that was kind of against the water, and gave it a start 260 to come on down and it came in between the Cemetery and this place.

Q When you were out there the water was over this track, wasn't it?

A. Yes, sir, I seen it when it was over and after it went down.

Q. Then you went back after it went down?

A. Yes sir.

Q. How long did you stay out there after it went down?

A. I don't know, I used to go out there lots of times, I used to go in that back way.

Q. I mean this time?

A. Well, I expect I knocked around out there looking at things an hour or more, just with the boys.

Q. Is your recollection about that general, that you have got that impression that there was a pretty bad wash out there?
A. Yes, I know it was there, I am certain of it because I saw it myself. I told you I was there when the water was high in a boat and got this wood and *bought* it home, when I went back out there afterwards, and saw the damage that was done.

Mr. Wimbish: That is all.

Redirect examination.

By Mr. Colston:

Q. Are you employed now by the Cincinnati, New Orleans and Texas Pacific Railway Company?
A. No sir.

Mr. Colston: That is all, you are excused.

261 John H. Ribble, a witness called on behalf of the defendants, having been first sworn by the examiner, testifies as follows:

Direct examination.

By Mr. Colston:

Q. What age man are you?
A. Sixty-two.
Q. Where do you live?
A. Harriman, Tennessee.
Q. Are you in the employ of the Cincinnati, New Orleans and Texas Pacific?
A. No, sir.
Q. You are not?
A. No, sir.
Q. W*h*ere you ever in the employ of that company?
A. Yes, sir.
Q. When did your employment begin with it?
A. The 10th day of April, 1883.
Q. What department were you connected with?
A. The operating department.
Q. Were you afterwards promoted to bridge foreman on that road?
A. Yes sir.
Q. When was that?
A. April 1st, 1886.
Q. Do you know anything about the flood of 1886, which occur-ed here at Chattanooga and came up over or against the banks of the Cincinnati Southern Railway, between Boyce Station and Chattanooga?
A. Yes, sir, I was here while the water was up.
Q. Were your men working here at that time?

A. I had no men at that time, the flood was before the
262 first of April 1886. Our foreman was away and I volunteered the services of the men when we found that the main line was blocked, and we went out to help them.

Q. Where did you go to assist them?

A. Well, we started from Chattanooga and went as far, nearly, as Rockwood and back.

Q. Do you remember about what time that was with reference to that flood of 1886?

A. It was during the highest part of the water?

Q. What did you notice the water doing, in 1886, in reference to these embankments between Boyce and Chattanooga, along the Cincinnati Southern Railway and the Western and Atlantic?

A. It was very swift just north of where the interlocker plant is.

Q. That is towards Boyce from what we now call East End Avenue?

A. Yes, sir, it was north of East End Avenue.

Q. And by north, you mean up towards Boyce?

A. Yes sir.

Q. Did you ever go in a boat with Peter Garman from Boyce to the old Staunton House location?

A. Yes sir.

Q. What was the character of the water that you went over at that time in that boat, was it swift or still?

A. It was very swift in there along back from the Staunton House towards Boyce. I tried to row the boat against the current and failed.

Q. Where did you find that current, what place, where that current was?

A. North of East End Avenue.

263 Q. Was it anywhere near opposite the National Cemetery?

A. Yes, sir.

Q. What was the direction of the current, which way was it running?

A. Toward *to* Cemetery,—angling towards the Cemetery.

Q. Then it was kind of a cross current, was it?

A. Yes, sir.

Q. From the northwest to the southeast would that be the direction?

A. Yes, sir, I tried to go through a little cut that was there and I missed it and went down over the bushes.

Q. The cemetery is on the east side of the Western and Atlantic?

A. Yes, sir.

Q. Have you noticed that embankment of the Cincinnati Southern there?

A. Yes, sir.

Q. What is your opinion as to whether that embankment operates as a protection to the Western and Atlantic embankment, against floods?

A. That it acts as a protection in preventing the current from striking the W. and A. tracks and also at this point where the swift water was the C. S. people, at that time, widened that cut and gave the water a better chance to pass through.

Mr. Colston: You can examine him.

Cross-examination

By Mr. Wimbish:

Q. Would there be any current at the point you spoke of, 264 Mr. Ribble, unless the water was high enough to be over the tracks?

A. No, if there wasn't any water there would be no current.

Q. No, I say unless the water was high enough to be over the tracks, would there be any current to come against the embankment there?

A. No, sir.

Q. That being true, how could the Cincinnati Southern embankment offer any protection to the Western and Atlantic?

A. Because of the grade the track is on the blow from the current it was over it.

Q. And before the currect began, that is up to that level, there was already water, there, was there not?

A. Well, I suppose some, I don't know.

Q. In other words, the idea we have is this, and if I am wrong please correct me: If the water comes in if it is back water and eddy water or whatever it may be, if it comes in and must rise to the h-ight of the embankment before there is any current, any direct current, does not that wall of water offer adequate protection, and how could the exist*a*nce of a joint embankment protect the Older embankment?

A. Well, the water coming across there would strike the C. N. O. and T. P. instead of striking the W. and A.

Q. Would it strike the embankment if that space there was already filled with water, the currect would be above it?

A. I don't know how it would.

265 Q. If the water was up to the height of the embankment when the currect began, the current would not strike the side at all, it would only strike the top?

A. I know if the water was up there, but that current was clear to the bottom and very swift.

Q. You heard the witness testify, and I would like to know if your own information coincides, that the first water that comes up there is back water from the south in the Tennessee River and that water comes up in there, eddy water and fills all of this low place before there is any current that comes from the river side of the embankment, is that right?

A. Yes sir.

Q. That being true, how could a current produced under those circumstances and at that level, strike against the embankment?

A. The water on the low side would not be as high as it was on the other.

Q. That being true, the damage would be done on the other side, where it seeks its level?

A. No, the current going with the track would make it wash on that side, if it was a direct flood down, it would wash on the low side.

Q. Now, if there was as much water on the Cemetery side of the Western and Atlantic as there was on the River side of the Cincinnati Southern there could be no current, for you would have the water at the same level?

A. Yes sir.

Q. Every current just have lower water in the direction which the current flows?

A. Yes, sir.

266 Q. There was no current that came along and flowed on the river side of the Cincinnati Southern embankment, no current down that way?

A. Flowed along and went over across both tracks and if the Cincinnati Southern had not been there the W. and A. would have taken——

Q. I am afraid I have not made myself plain. If the water had been the same level there would not have been any current on either side?

A. No but it wasn't.

Q. On which side was the highest?

A. On the west side.

Q. Is that the Cincinnati Southern side?

A. Yes, sir.

Q. Therefore the current must have been in the direction of the Western and Atlantic side because that would be the low side?

A. That is the low side.

Q. That being true it would wash it on that side?

A. Possibly some but it was not low enough to make a fall, and if it had not had the Cincinnati Southern as an embankment the water would have gone across the same way and washed on both sides.

Q. If not the water on that side might have been as high as the embankment?

A. No, it wasn't so high, or there would not have been a current.

Q. If it was as high there could not have been any current?

A. If it was as high, but it wasn't as high?

Q. I am speaking of the river side?

A. The river side was the highest.

267 Q. Therefore, if it was on a level with that there could be no current, and the water was there around the embankment, the current came and comes only after the back water get- up to the level of these tracks, then this current strikes up?

A. No, this water comes out of the Tennessee when it comes out by Citico, and the current makes a current through the back water.

Q. I know, but does not that back water protect the embankment against the current?

A. Suppose it beaks the current out, the current was quick, and the Tennessee rises faster *that* the back water could come around?

Q. But still at last the current must be from the higher level to the lower?

A. Certainly.

Q. Then it is not perfectly clear that, where you have a higher level and a lower level, I ask you, if the current is not generally the greatest when the water from the higher level seeks the lower level?

A. Yes, sir, it is.

Mr. Wimbish: That is all.
Mr. Colston: You are excused Mr. Ribble.

PETER GORMAN, a witness called on behalf of the defendants, hav*e*ing been first duly sworn by the examiner, testi*d*ies as follows:

Direct examination.

By Mr. Colston:

Q. Where do you live?

A. Chattanooga.

Q. Are you in the employ of the Cincinnati New Orleans and Texas Pacific Railway Company?

268 A. Yes sir.

Q. How long have you been in that employ?

A. Thirty seven years yesterday.

Q. What time does that take you back to?

A. Takes me back to 1881, 21st day of March.

Q. 21st day of March?

A. 21st day of March, yes sir.

Q. I will ask you where you first began to work for the C. N. O. and T. P. Railway Company?

A. At Somerset.

Q. Between Somerset and Rockwood?

A. Yes, sir.

Q. In what capacity, brakeman?

A. Brakeman.

Q. How many trips did you make on that division?

A. Three trips.

Q. Then where did you go?

A. Went on a construction train with headquarters at Emory Gap.

Q. After that you came to Chattanooga?

A. Our District was Glen Mary to Chattanooga and we came into Chattanooga once in a while.

Q. Do you remember bringing in car loads of dirt for the purpose of filling in and widening the Western and Atlantic embankment from Boyce to Chattanooga when the Cincinnati Southern was building from Boyce to Chattanooga?

A. We brought in several cars, I don't remember just how many,—that must have been along about the 1st of April.

Q. What year?

A. 1881.

269 Q. Where did you dump that dirt?

A. We dumped it right where that—they used to call it the W. and A. target, at the end of our track where it was supposed to cross over the W. and A.

Q. Where would that be now with reference to the present conditions?

A. That would be between three and four hundred yards from the present interlocker plant?

Q. It would be three or four hundred yards, then, south?

A. Towards Chattanooga.

Q. From East End Avenue?

A. Yes sir.

Q. Is that right?

A. Yes, sir.

Q. Well, what do you know about any shops being located along there?

A. The shops are in the same place *there* were when I came here, only added to.

Q. Well, now have you noticed any floods in Chattanooga in the Tennessee River that would come up on this embankment of the Cincinnati Southern from Boyce to Chattanooga?

A. Yes, sir. I was here in 1886 at the time of the flood, from the time it started until it left, and also in 1917.

Q. Now, during the 1886, flood what capacity were you working in for the Cincinnati Southern?

A. Local Conductor, but on account of them having some small slides they taken me off and I came into Chattanooga that
270 morning. Where these slides were the passenger trains had to back up and I got about forty men and went to fix up the slides, up at Rockwood, and came back and remained at Boyce during the time of the high water and was the first in from Boyce to Chattanooga.

Q. During the time of that high water when you came in from Boyce to Chattanooga, how did you do it?

A. Well, I came in one day in a boat.

Q. From where, from Boyce to Chattanooga?

A. From Boyce to Chattanooga.

Q. What did you see the flood waters doing in reference to affecting the embankments of the railroad?

A. Well, the waters were very swift from a point about what you might call Harrison Avenue now, to south of, you might, say, south of where the interlocking plant stands, along in that neighborhood.

Q. What distance would that be?

A. That would be over a mile, I guess.

Q. Which way did the water drive, if it drove at all?

A. Well it drove, you might say, southeast, I should think.

Q. Was it kind of a cross current?

A. Yes, sir, a cross current from Citico kind of cata-cornered you might call it.

Q. What effect, do you know, did it have on the Railroad embankment of the Cincinnati Southern?

A. Afterwards, you say?

Q. Yes?

A. After it went down?

Q. Yes?

271 A. Well, from a point this side, a little this side of where the Southern Railway crosses the C. N. O. and T. P. it was washed out under the edge of the ties and some places between the ties and when you got down to McCallie Avenue, why the track was throwed way over on the W. and A., and considerably washed, a fill that existed at that time just south of McCallie Avenue, between there and the Cemetery.

Q. What Cemetery do you speak of?

A. The National Cemetery.

Q. This was on the west side of the Cincinnati Southern at a point about opposite the north end of the National Cemetery?

A. Yes, sir, nearly up to the bend of the National Cemetery.

Q. The National Cemetery is on which side of the Western and Atlantic?

A. It is on the east side.

Q. Did you assist in making any repairs?

A. Yes, sir.

Q. To the Cincinnati Southern to this point where you have spoken about the wash-out?

A. We filled in and filled under the ties where it was washed out and not safe to run over it.

Q. Did you see the effect of that on the Western and Atlantic embankment and the right of way?

A. Yes, sir, the water *the water* had gone down so the tracks were most clear, I guess, and so far as any wash-out on the W. and A., etc., I think their track was moved a little, but not damaged apparently, that I could see.

Q. Which had the more damage, the Western and Atlantic or the Cincinnati Southern, from that flood?

272 A. The Cincinnati Southern.

Q. I am speaking now of this place nearly opposite the National Cemetery, did the Cincinnati Southern have more damage?

A. Yes, sir.

Q. What is your opinion as to whether or not, bases on your observation, the *ebm*ankment of the Cincinnati Southern protects, operated as a protection to the embankment of the Western and Atlantic?

A. Well, it did at that time I should think. I- fact I know, for the simple reason that our tracks, when the water reached the top one track was turned over and left it unprotected and naturally it would wash more than the track what was covered over, the embankment.

Q. Well, do you know anything about the flood of 1916 or 1917?

A. 1917, yes, sir.

Q. What did you notice about that flood?

A. Well, that was a little different. The water came in behind instead of crossing over at Citico. Since the flood of 1886 they have unloaded and piled a lot of cinder out north of the furnace at Citico and the current did not come across there, that is it did not break across, and didn't in 1917, until it got to the height—in fact there wasn't much current at any time in 1917 like there was in 1886.

Q. What made the difference, if you know, if you could form an opinion from observation?

A. Well, the difference was the water didn't come across, it was higher at that point and the water came in from behind.

Q. What do you mean by coming in——?

273 A. Came up by the Cemetery and around over that low ground at the cemetery.

Q. What do you mean by coming in from behind?

A. That is what I mean, I should have said it came from the river from a point down below Chattanooga.

Q. And then backed up?

A. Backed up.

Q. Between the Western and Atlantic track and the Cemetery, is that it?

A. Well, yes, it crossed over there, just a general rise, you understand.

Q. Now, did you notice any washouts in 1917 on the Cincinnati Southern, or the C. N. O. and T. P., between Boyce and Chattanooga?

A. No, there wasn'*y* any washouts to amount to anything. There were some places where just a little, but no damage, when the water went down, in fact we ran trains over it all the time.

Q. Do you know whether or not there was any wash of embankment on the C. N. O. and T. P. north of Hixon in 1917?

A. No sir.

Q. Do you remember of it being north and *was* from the Tennessee River?

A. No sir.

Q. The result of the water of 1917?

A. No, sir, not a wash-out, you understand.

Q. I don't mean wash-out, any substance or giving away of the embankment?

A. Oh, yes, as the water goes away the bank follows it.

Q. Did that occur in 1917?

274 A. That occurred in 1917.

Q. Now, how high was that embankment at the time of the subsid*ance* or giving away of the embankment in 1917, how long had that embankment been there?

A. I don't remember how many years, been a number of years there.

Q. About how far back was that built there, as far back as 1880?

A. Well, we had some since that, but I don't remember just the dates of the high water. Usually why, it will naturally when it disappears, goes down, some fills will go down with it.

Q. And that occurred on fills of the Cincinnati Southern that had been made as far back as 1880, did it?

A. Well, yes, some of them.

Q. I mean now from this 1917 flood?

A. Yes, sir.

Q. And was all from back water sta-ding against the fill?

A. Back water.

Q. I don't want you to misunderstand me. It has been claimed by some people that a fill, when it gets old and solidified and settled, cannot be affected by water standing up against it, no matter how long water may stand up against it. What I am calling your attention to is where in 1917, which would be about thirty-seven years after the embankment had been built on the Cincinnati Southern north of Hixon and north of the Tennessee River Bridge, the embankment subsided or let down with the recession of the flood?

A. Yes, sir.

275 Q. That was so?

A. That is so, yes, sir, they gave down.

Mr. Colston: That is all, you can examine.

Cross-examination.

By Mr. Wimbish:

Q. Where is this point at which you say that the recession of the water carried with it the subsidance of the embankment?

A. Carried the bank away?

Q. Yes?

A. Well, there has been several, several points.

Q. I mean the one you testified about?

A. This slide south, or north of Hixon.

Q. Where is Hixon?

A. Hixon is nine miles north.

Q. Was that an old embankment or a fresh embankment with the double tracking work along there?

A. No, sir.

Q. Well, is it a fact that if there is an old embankment, as much as thirty years old, and the water comes in and against that embankment, I will say back water, if it rises on that embankment, whether it will cause a subsidance on that embankment, is that a fact, or is it your opinion?

A. I can't give you the point but it occurred just a few years back,—I can't locate the point now but it occurred a few years back, where one of our culverts got stopped up and to my certain knowledge that had never been any trouble from the time I had been on the road until this present time, and the water filled in there clear up almost to the ties and remained there a number of days and finally disappeared, but in the meantime we had a small slide

276 there, which goes to prove that this thing does do it. That happened on our road and I can't just locate the place right now. If I had known this question was going to come up I might——

Q. I am very much interested in knowing that is a fact, whether that is produced without a current, whether a subsid*a*nce without a current can produce a wash-out or will settle clay embankments. I want to know if that is merely your opinion?

A. It is not my opinion, that is an occurr*a*nce.

Q. And there is no peculiar circumstance?

A. And there is nothing about it, I had known it all along and there was nothing extraordinary about it.

Q. You had a good clay embankment?

A. So far as we know. I don't know how long it had been there, but it had been there since the road was built.

Q. If that is true that case must be true in any case?

A. If it remains long enough.

Q. How long must it remain?

A. I suppose it must remain until it gets perfectly saturated.

Q. How long would that take?

A. I could not say that. I remember this case and I remember this remained several days, may be a week, but I don't remember just how many days, I don't remember, and I could not say how many days it would have to stay to do that.

Q. How much damage did the subsid*a*nce of the water in 1917 do to the bank of the Cincinnati Southern between Boyce and Chattanooga?

A. Not much damage because we got no fills in there to
277 amount to anything.

Q. Those you did have?

A. Well, in places why you could see the ground a foot and a half that way washed.

Q. How much damage was done in the flood of 1886, not by the washing of the current over the top, but by the subsid*a*nce of the water?

A. Well, that was on virtually level ground that place was on and in 1886, between Chattanooga and Boyce——

Q. Along the embankment of the Cincinnati Southern?

A. Not except this one point right here at Cemetery Hill and that has been filled in since.

Q. How much damage was done there in 1886 by reason of this subsid*a*nce of the water?

A. Well, I don't remember exactly how many car loads of stuff we had to put in there where this wash,—where there was a wash-out.

Q. Was that on top of the embankment caused by the current, or was it on the side of the embankment, caused by the subsid*a*nce of the water?

A. Well, I could not say, but it had disappeared when the water got down, just went away, whether it was washed or not,—it may have been both.

Q. You don't know?

A. It may have been both.

Q. But, I say you don't know?

A. Positively, no, but there was a wash, you could see where it had washed over the top you know.

Q. Now, I will ask you if there was any damage done to the embankment of the Cincinnati Southern Railway between Boyce and Chattanooga, the side of the embankment I am talking about now, by either the flood of 1886, or 1917?

278 A. No, not much on the—As I told you we haven't got much embankment in there, but there in places more than anything else that we had a few places washed away from out from under the ties from the current this side of the Tennessee road cross-overs, the Southern cross-over, at that time it was the Tennessee road.

Mr. Wimbish: That is all.

Redirect examination.

By Mr. Allison:

Q. Mr. Gorman, you testified to these two slides, one at a point north of Hixon and another at a point north of the Tennessee River Bridge, in March, 1917, now was there any current ever the railroad at either of these points?

A. No current at all.

Q. Was that simply back water standing up against the embankment during the time the River was up?

A. That is all we have up there, is back water, no stream at all.

Q. You were asked about the extent of the slides, I will ask you whether or not do you know that at one of those places, the point north of the Tennessee River that the slide was so great a passenger train trying to go over it turned over?

A. Yes, that was after the water receded.

Q. And this embankment at both of those points, was it, or not, built of substantially of the same material as the entire embankment between Boyce and Chattanooga, same character of soil, borrowed dirt?

A. Yes sir, it is supposed to be clay.

Q. And at both those points where you had those slides I believe you said so far as you know the fills had been built when the road was built, something like 1880?

A. Yes, sir, had been built a long time.

Mr. Allison: That is all.

279 Recross-examination.

By Mr. Wimbish:

Q. You are not a civil engineer?

A. No, sir.

Q. You know nothing about the action of water except what you testified, do you?

A. Yes, I like to got drowned one time I was in the Cumberland River I went into the River and it was all right, seemed to be all right at the top, up high there was no current and the current underneath took my feet out from under me, and I like to have drowned. I don't know how it got down there but it was there.

Q. It didn't cause any sloughing or sliding did it?

A. No, sir, I am all here.

Mr. Wimbish: That is all.

Mr. Colston: You are excused.

William E. Wheelock, a witness called on behalf of the defendants having been first duly sworn by the examiner, testifies as follows:

Direct examination.

By Mr. Colston:

Q. How old are you?

A. Fifty-one.

Q. Are you superintendent of terminals in Chattanooga for the Cincinnati, New Orleans and Texas Pacific Railway Company?

A. Yes, sir.

Q. How long have you been in the service of the C. N. O. and T. P.?

A. Since 1883.

280 Q. At that time the Cincinnati Southern road had been built into Chattanooga from Boyce and was operating, I suppose, just as it is now?

A. Yes, sir.

Q. Have you ever seen any floods from the Tennessee River that would come up and work against the embankments and in the cuts of the Cincinnati Southern from Boyce to Chattanooga and also up against the Western and Atlantic right of way?

A. The only one that I have seen was in 1917. In 1886, the fall of 1886, we were caught north of Chattanooga and could not get in here, didn't get in until after the water.

Q. That is you were held up north at Boyce Station?

A. Yes, sir, north of Hixon.

Q. Well, when the water went down did you come into Chattanooga from the north?

A. Yes sir.

Q. Well, how soon was that after the water went down?

A. Well, just as soon as it went down and we could get the tracks fixed up, we had to fix up the tracks at two or three different places.

Q. I am talking about 1886 is that right?

A. Yes, sir.

Q. What track repair was needed on the Cincinnati Southern?

A. A fill north of Hixon went down, sunk some.

Q. Now, between Boyce and Chattanooga?

A. Between Boyce and Chattanooga, they had that repaired when we came in.

Q. Did you see where the repairs had been made?

A. I saw where the repairs had been made around the
281 Cemetery there, but I could not see how much, just been a
lot of fresh dirt put in there.

Q. Did you notice any damage, at that time, to the Western and Atlantic track along there, at that same place where there was damage to the C. N. O. and T. P.?

A. Well, I could not say that for I did not notice.

Q. What is your opinion as to whether that track construction of the C. N. O. and T. P. is from Boyce to Chattanooga operated as a protection to the Western and Atlantic track in times of flood?

Mr. Wimbish: I object to that question unless this witness qualifies as an expert or states the facts on which he bases his opinion.

Q. Well, speaking from what you have seen along there?

Mr. Wimbish: I object to that. I want him to state the facts upon which he bases his opinion, not a general expression.

Q. Very well, state your facts?

A. I can state facts for the flood of 1917, just north there north of McCallie Avenue where the water comes through there, it cut one of our tracks down there, the head water comes through there and there is quite a current on the west side, the water flows to the south, it cut one of our tracks out there until we had to slow our way out, I think for about six hours we didn't allow trains to go over that, and we had to put in fifteen or twenty car loads of cinders.

Q. How was the Western and Atlantic track affected at
282 that time?

A. It didn't affect that at all.

Q. How far away *way* that track from yours?

A. Just adjoining *out* track there, fourteen foot centers, I think it is.

Q. Now, then, based upon your general knowledge and upon what you have seen, what would you say as to whether the embankment of the Cincinnati Southern between Boyce and Chattanooga operated as a bulkhead or protection to the embankment of the railroad of the Western and Atlantic?

Mr. Wimbish: I object to that testimony as incompetent because the witness does not qualify as an expert, and not being an expert or qualifying as an expert he must state facts and cannot give his opinion as a matter of general knowledge and information.

Q. Answer the question.

A. I can say if the Cincinnati Southern or the Cincinnati, New Orleans and Texas Pacific tracks had not been there at that time, it would have washed the Western and Atlantic tracks out.

Q. The Western and Atlantic tracks was not washed away?
A. No sir.

Mr. Colston: You can examine him.

Cross-examination.

By Mr. Wimbish:

Q. Mr. Wheelock, how do you know?
A. From personal experience and seeing it.
Q. That is not the question. How do you know if the Cincinnati, New Orleans and Texas Pacific embankment had not been there the tracks of the Western and Atlantic would have been washed away?
283 A. It is the same kind of soil and I don't see why it would not have done it.
Q. Is that the only thing upon which you base your opinion?
A. From that current that comes around there it was coming around under that viaduct over the Southern Railroad, that water comes through there, I suppose, fifteen miles an hour, and it came through there at least a fifteen foot head of water, came through there and struck that bank to make that curve and come south.
Q. As I understand all it washed was some of the superficial structure of the C. N. O. and T. P. that it required about six hours to repair your tracks before you could get into Chattanooga?
A. Yes sir.
Q. And the Western and Atlantic track is immediately adjoining?
A. Yes sir.
Q. And that was not injured?
A. No.
Q. Do you think that the tracks of the Cincinnati Southern acted as any sort of a dam or protection to the tracks of the Western and Atlantic?
A. Why, *there* must surely have acted as a bulkhead there to stop the flow of that water going against the W. and A., when if the C. N. O. and T. P. had not been there——
Q. They are the same grade there?
A. Yes sir, the same grade.
Q. And this water that washed the track was high enough to be over the track, wasn't it?
A. No, sir.
284 Q. How did it wash the track, undermine it?
A. Yes, sir.
Q. How do you know that?
A. I saw it.
Q. How, after?
A. No, sir, all the time it was rising. All the time it was rising I was there inspecting it.
Q. Did you see the gradual eroding?
A. Yes, sir, gradual, just cut the bank away. We ran our trains through thirty-six inches of water up there further north.

Q. Was the current going over the tracks of the Western and Atlantic?

A. Not at that point.

Q. What became of it?

A. Came in there and hit the side of the bank and came on south.

Q. Did not flow across the tracks?

A. Not at that point.

Mr. Wimbish: That is all.

Redirect examination.

By Mr. Allison:

Q. Mr. Wheelock, during the high water of March, 1917, did you have occasion to visit two points where the fill had had a slide, one near the Tennessee River Bridge, and one up north of Hixon?

A. Yes, sir.

Q. Now, do you know whether the water got over the railroad at either one of those points or whether the back water just stood up against the embankment?

A. It lacked, I suppose four or five feet of going over the track
north of Hixon, north of the river, we had a passenger train
285 to turn partly over and I suppose it lacked seven or eight feet,
probably more,—ten feet.

Q. Was there at any of these points, was there any current over the railroad, or was there simply back water standing up against the embankment during the high water?

A. That is it, yes, sir.

Q. What effect did that water standing against the embankment, just back water, have on the embankment?

A. Just north of the Tennessee River Bridge it affected a passenger train we had in there, turned over the engine and smoking car, mail car and baggage car went down the embankment.

Q. What cause- it to go down the embankment?

A. Why the sinking fill.

Q. You mean the fills slid as the water went down?

A. Yes, sir. Just north of Hixon, we were out there, the track was settling and we had a train load of cinders out there, we pulled the engine, went across this point with the engine and seven—six cars I believe it was, started across and the engine settled, went down.

Q. Now, had the grading of the road at those points where you have had these slides, been changed since it was originally constructed about 1880?

A. It has not been changed since 1886, or 1883, when I went with the railroad.

Q. So that the embankment where these slides occur had had at least since 1883 to settle?

A. Yes, sir.

Q. To your knowledge?

A. Yes sir.

286 By Mr. Colston:

Q. These slides occurred what year?

A. 1917.

Q. What experience had you had in railroading prior to the time when you became superintend*a*nt of terminals, what kind of service had you performed?

A. I went with the road *breaking* in 1883, was promoted to conductor in 1888. I was promoted to Yard Master in—I forget what year it was, and was Yard Master five years, I was Train Master five years, and I have been superintend*a*nt of terminals going on eleven years.

Q. During that time you have had experience with road operations and the operation of trains over the road?

A. Yes, sir,—I ran a work train about three years.

Mr. Allison: One other question I wish to ask.

By Mr. Allison:

Q. Mr. Wheelock, will you state what was the character of the soil in the neighborhood of these places where the slides occurred,—the fills were made usually from the cuts, were they not?

A. Yes sir.

Q. Well, state what the soil is, is it clay or not?

A. It is clay, yes, sir.

Mr. Allison: That is all.

Recross-examination.

By Mr. Wimbish:

Q. These places you spoke of are just north of the Tennessee River, these slides?

A. One was north of the Tennessee River, where the passenger train went down, I suppose about a quarter or half a mile north of the Tennessee River Bridge, and this one I spoke of is out just
287 north of Hixon, and Hixon is nine miles from here,—about four and a half miles north of Boyce.

Q. Now, on which side of the embankment did this slide occur, the one you spoke of just north of the Tennessee River bridge?

A. That is where the train went down on the East side.

Q. Was that the side towards which the river flows?

A. Well now, the river up there, there is no headwater comes in there, that is all back water that comes in there from backing the water up. There is no head water comes in there.

Q. Was that the nearest slide to the rive- that you had referred to?

A. Yes, sir, that is the nearest I know anything about and the slide was just north of the Tennessee River.

Q. Do you know how long that water had been standing there?

A. No, I could not say, I think probably eight or ten days.

Q. Was that a point where the water frequently stands?

A. No, only just in case of high water.

Mr. Wimbish: That is all.
Mr. Colston: You are excused Mr. Wheelock.

288 William M. Nixon, a witness called on behalf of the defendants, having first been duly sworn by the examiner, testifies as follows:

Direct examination.

By Mr. Allison:

Q. What is your age, Mr. Nixon?
A. Sixty-seven.
Q. Do you live in Chattanooga?
A. Yes, sir, I have been in Chattanooga since October 20th, 1870.
Q. What has been your business during that time, Mr. Nixon?
A. Well, I was first connected with the River, Warehouse and Steamboat business.
Q. What years?
A. In 1870, '71, '2 and '3, and in the grain business and wholesale groceries business, and was on up to 1878, and then connected with the steamboat business as the President of a steamboat company and interested in Mining business, iron ore, etc.
Q. Did you ever hold any official position in the State of Tennessee?
A. Yes, sir, I have had two official terms, as Commissioner of the Prison Department, Mining and Contracting Department for the State for six years, then again I have been two years General Manager of the Bushy Mountain Coal Mining, the State of Tennessee Coal and Coak-ing operations. Then before that I was United States Marshal in Cleveland's first term.
Q. Had you ever had any experience in the construction of roads, fills?
A. Yes, sir.

289 Q. While you were connected with the State of Tennessee, did you build any roads with the convicts?
A. I built about sixteen miles of roads in Hamilton and Campbell Counties with convict labor while I was connected with the State, and previously I did some road building and construction work of various kinds.

By Mr. Wimbish:

Q. You mean railroad building?
A. No, sir, road building mostly, and some railroad building. I built some railroads at Nashville and some at Bushy Mountain.

By Mr. Allison: .

Q. During that time have you had opportunity of observing the effect of water, both standing against fills that had been built and running over them?

A. Yes, sir, I have had some experience of that sort, and observed the experience of others in that line. I went over the Cincinnati Southern Road last year about the height of the flood.

Q. Well, we will come to that directly. First, have you, during your residence in Chattanooga, observed the various floo*rd* and high water from the Tennessee River in the neighborhood of the property of the Western and Atlantic and the Cincinnati Southern right of way between Boyce and Chattanooga?

A. Yes, sir, I was in a business that required me to observe and be connected with the river and the floods, and in 1875, it came here to our store, sixteen inches it was where Timothy is located. Now, in 1886, I was in the warehouse business near the corner of Cowart and the railroad and the 1886 flood came into our warehouse. And
during those times I was out around and saw the embank-
290 ments and the river and the tides and the current, the effect
of the flood, both those floods and also in the 1917 flood I
was here and went through that one.

Q. Let us go back, then, Mr. Nixon, to the conditions as they existed prior to the passage of the Act of the Georgia Legislature of 1879, granting to the Trustees of the Cincinnati Southern the right to build this road, tell us about the flood of 1875, if you know, what affect it had upon the Western and Atlantic right of way between Boyce Station and Chattanooga?

A. Well, in 1875, the Western and Atlantic Road was a single track road from Boyce to Chattanooga, without any ballast.

Q. There was no embankment on the west of it?

A. No embankment, it was a single embankment and a single track road and came clear down to Market street before, I think, there was hardly a double track on it and its switch yards were west of Market street and it was a single track road all the way up there, and when the 1875 flood was fifty-four feet plus, and covered that track some seven feet, something of that sort, and with that very strong current that occurs when the river gets over fifty feet, it was all over west of the road and, of course crossed it there by the Cemetery,—I wasn't there after the flood to observe what damage it did, but I recall that the road was out of business about ten days, that no shipping could be done for ten days or more.

Q. What road do you refer to?

A. The Western and Atlantic Road.

Q. For what distance was the water over the Western and Atlantic Road between Boyce and Chattanooga in 1875?

291 A. It must have been all the way to Boyce, but I am not
certain, I wasn't at Boyce, but it must have been all the way to
Boyce judging from the 1917, tide which was forty-seven, seven (47.7), and the 1875 tide was fifty-four plus, and the 1917 was nearly to Boyce, was over the track nearly to Boyce, the 1917 at 47.7, therefore the 1875 flood must have been over the track to Boyce or nearly.

Q. Now, for what length of time did you say the Western and Atlantic was out of business and unable to operate trains over its right of way, after the flood receded?

A. Why, fully ten days. I don't recall the exact time, but fully ten days, in fact all of the roads were out of business the Nashville road was out from Shellmound down near the mountain here and all of the roads to the north were out except the Southern from here to Knoxville.

Q. When the back water from the Tennessee river gets high enough to flow over the embankment both of the Cincinnati Southern and the Western and Atlantic, is there any current over any portion of this road between Boyce and Chattanooga?

A. My experience in these three floods has been that the first high water that we have is back water, that comes in, the back water, up the Chattanooga creek, on the far side of Chattanooga, clear up and covers the valley, except some few levees, and comes up over these tracks and when the river gets about fifty feet, or did get fifty feet the *the* current sets up, strikes over the Southern fill east of Citico and comes through the culvert which is termed here the Rockeye, a large culvert in the Southern at Citico creek and probably gets over some grade of the Southern and the water takes a short cut and
shortens the distance about two thirds, has a terrific current
292 between Fort Wood and the National Cemetery, the current
there is very strong in fact in 1875, is was almost impossible to ferry it and get across there.

Q. What do you mean by "ferry it"?

A. I mean to cross in a boat, the current was so swift.

Q. Now, which embankment did that current strike first, the Cincinnati Southern or the Western and Atlantic?

A. In 1875, there was only one embankment. Now——

Q. I mean now, when it gets up?

A. In 1886, it struck the Cincinnati Southern embankment first and in 1917, it struck one of the additional embankments first,—the Cincinnati Southern has some ten tracks west of the Western and Atlantic now.

Q. Since that time the Cincinnati Southern has extended its fill out further to the west?

A. Yes, and north,—extended it north and westward from the Western and Atlantic track.

Q. I am speaking of the floods that we have had since the construction of the Cincinnati Southern fill paralleling the Western and Atlantic fill, the high water strikes since the construction of the Cincinnati Southern road between Boyce Station and Chattanooga, which fill first?

A. It strikes the Western track of the Cincinnati Southern first, that is the water, though, I mean it is the action of the current that strikes it first.

Q. Well, when these high waters from the Tennessee River get high enough to get over both the fills of the Cincinnati Southern
and the Western and Atlantic with this current that you speak
293 of, what effect does it have on the fill, does it or not—does the
construction of the fill on the west of the Western and Atlantic road offer any protection to the Western and Atlantic fill?

A. It certainly does, it is an enormous bulkhead, breast works on the force side, against the current.

Q. Now, from your experience in building roads and embankments and fills, and your observation of the effect of back water standing against a fill, please state your opinion whether or not, if back water stands against a fill whether or not it will affect it?

A. Back water standing against a fill? Yes, sir. The material, earth or clay, will soften,—it will soften and disintegrate it, and if any weight comes on it, it will settle and if the material is anyways sandy the fills will slide, and the disintegration will reduce the grades, destroy it.

Q. Did you have any opportunity of observing what effect the back water from the Tennessee River had on the fill of the Cincinnati Southern Road at the point just north of the Tennessee River Bridge and also at a point north of Hixon, by the high water of March, 1917?

A. Yes, sir, I passed over the line and saw where the fills had receded from the back water on either side. The back water had receded to some extent and the fills had gone down and a train was wrecked at one place, that is nearly turned over, and at another it sunk down.

Q. Do you know how long those fills had been standing?

A. They were the original fills of the road, put in about 1879,
something like that, with probably some additions. There
294 had been some additional reinforcement or fills that had been
put against them in widening them.

Q. This happened in March 1917?

A. It must have been thirty odd years that they had been standing there.

Q. You are familiar with the country between the Tennessee River bridge and Hixon, are you not, the character of the soil there?

A. Yes, sir.

Q. What is it?

A. Clay, a kind of clay,—some of it is gravel.

By Mr. Wimbish:

Q. You say some gravel?

A. I say some gravel, beyond Hixon.

By Mr. Allison:

Q. State whether or — there are cuts and fills along this road between the Tennessee River bridge and Hixon?

A. There are.

Q. Do you know whether the dirt was taken from those cuts to make the fills?

A. Yes, that was done,—that was the case.

Q. What was the character of that dirt?

A. Well, mostly clay.

Q. Mr. Nixon, take the map before you of the City of Chattanooga and the surrounding country showing the topography of the country as far as Boyce Station?

A. Yes, I have a map, a real estate map that shows the features of Chattanooga.

Q. Will you explain the topography of this ground so as to explain why it is that when this water reaches a certain stage to pass over the embankment of the two roads, that it creates a current?

295 A. Well, Chattanooga, beginning at Fort Wood and going westward to Market Street that is a hollow and on to Cameron Hill is high ground and beyond Fort Wood to the foot hills of Missionary Ridge is a valley, that is a low ground. The lowest point between Fort Wood and Missionary Ridge is between the National Cemetery and Fort Wood, through which the river when it gets to fifty feet high runs through in a rapid current, and between Fort Wood and the National Cemetery is a narrow place and makes the current more strong through there.

Q. Describe in that connection, Mr. Nixon, the bends of the river and the course that the water would take when it breaks over those embankments?

A. Well, the river runs out over the banks eastward from away up towards the mouth of South Chattanooga Creek and covers the flat land until—and going southward until when it is fifty feet high,—of course there it is cut off, otherwise before that occurs, before it gets that high it would — around — hollow, around Cemetery Hill and around between the Belt tracks at the foot of Look Out Mountain and then goes northward.

Q. That is the natural channel of the river?

A. That is the natural channel of the river. This cut-off reduced the distance, you might say, about two-thirds when it reaches fifty feet, and, of course, the water takes the shortest distance and it makes the current very strong and rapid.

Q. Chattanooga is in a bend of the Tennessee River is it?

A. It is indeed.

Q. And when the back water coming from the direction of Boyce reached a point in the neighborhood of the National Cemetery
296 where it does it flows to and gets back into the Tennessee River?

A. Flows into the back water and reached the Chattanooga Creek at the foot of Look Out Mountain.

Q. And that shortens the distance how much?

A. About two-thirds, the flow part of it, the flow would be about two-thirds shorter.

Q. And is that what creates the current that passes over these fills up in the neighborhood of the National Cemetery?

A. Unquestionably.

Q. I will ask you to file this map to your deposition, Mr. Nixon?

A. Yes, sir.

Mr. Colston: We will call it Defendant's Exhibit No. 1.

Received and marked Defendant's exhibit No. 1.

Mr. Wimbish: Will you furnish me with a copy of it.
Mr. Allison: I will get you a copy.

Q. You have testified about the high tides of the Tennessee River beginning with 1867, the next one was what year?

A. 1875.

Q. And the next?

A. 1886.

Q. And the next?

A. 1917.

Q. 1917, now, I will ask you whether or not, during all of the intervening years there had been high water from the Tennessee River that would back the water out of its banks so as to come partly up on these fills that I have been talking about, and not go over
297 the top of the tracks?

A. Yes, there was, every few years, a tide of any where from thirty-five to forty feet. We have had a tide 42.5 this year, in 1918.

Q. You do not characterize a tide of forty feet as a high flood?

A. I believe the Signal Service gives thirty-three feet as the danger line, but really the danger line is forty feet. We won't have much disturbance or much loss or trouble until the river passes forty feet.

Q. But as you said there have been frequent high waters in the Tennessee River where the back water came between Chattanooga and Sherman Heights, we call it?

A. Yes, sir.

Q. And would stand more or less up on the fills for the Cincinnati Southern?

A. Yes, that will go up, when you pass forty feet and begin to reach these fills.

Mr. Allison: You can examine him.

Cross-examination.

By Mr. Wimbish:

Q. Mr. Nixon, as I understand your testimony, the high water first manifests itself by back water?

A. By backing up into this low country here.

Q. From a point below Chattanooga, near Lookout Mountain, known as Moccasin Bend?

A. Opposite Moccasin Bend.

Q. And that no current is produced until you reach a tide of fifty feet?

A. Yes, there is a current in the river all the time.

298 Q. I am speaking of the back water?

A. There is none in the back water in south of Chattanooga, in the back water until the cut-off occurs.

Q. That is right, I should say it is back water without perceptable current?

A. Yes, sir.

Q. When it reaches fifty feet, it breaks over above Chattanooga?

A. Yes, sir, about this Southern Railroad fill.

Q. And it breaks over the bank of the river north of Chattanooga and above Chattanooga?

A. Yes, sir.

Q. And seeks a shorter direction through?

A. A shorter direction through.

Q. Now, I want to ask you if it is not true that the tracks of both the Cincinnati Southern and the W. and A. are covered by the back water before you reach a tide of fifty feet?

A. They are, they were covered last year, they were covered at 47.7, the rails were covered nearly to Boyce before this current came through and, well the current never came through in 1917, but I observed that the rails were covered nearly to Boyce, at 47.7.

Q. I think I understand it clearly now, thank you, Mr. Nixon.

A. The track along the Southern at the culvert was three feet deep. I passed there and the water came up to the floor of the Pullman car that we were in for a short distance.

Q. Now, Mr. Nixon, if no current sets in until after these tracks are covered, how in your opinion does the Cincinnati South-
299 ern embankment afford any protection to the embankment of the Western and Atlantic?

A. Because it withstands the current, several feet of heavy water flowing at a rapid rate strikes the Cincinnati Southern first.

Q. But there is no current until the water rises considerably above the level of these tracks?

A. This current whenever it crosses the Southern whenever it reaches about fifty feet is a terrific current there.

Q. But the current does not set in until after the tracks have been completely submerged.

A. No, that is right.

Q. Therefore this current is a higher current?

A. It is a higher current.

Q. When it sets in this fill *if* already protected by this back water?

A. Yes, but it is an active current of water down at the bottom.

Q. In that condition I really don't see how,—and if I am wrong I would like you to correct me about this,—if the track is already covered with water and a higher current sets in, how the existence of one bank protects another?

A. Well, it is like the current would strike the side of this table (indicating), imagine this table represents those tracks and embankments and a current of say five feet of water or seven feet of water or ten feet of water, heavy current, strikes this embankment as this table would represent it, the first force of it would be against
300 the first margin of the embankment it struck first, therefore it would not, the last embankment would not get the force like the first.

Q. But if the current does not set in until the water is above the embankment?

A. The current goes all the way down to the bottom, it is all current.

Q. I see your idea the way that does?

A. Yes, sir.

Q. You have had a great deal of actual experience but you are not a civil engineer, are you?

A. No, sir, I am not a graduated engineer, I am kind of a home made engineer.

Q. Now, in 1875, which was the first flood concerning which you testified as to the effect, you stated that the Western and Atlantic was a single track line, with no ballast, how was it in 1879, was it ballasted then?

A. I don't believe it was ever ballasted to amount to anything until the N. C. and St. L. leased it. In fact there were very few roads around here that were ballasted until the Cincinnati Southern was built. It was the first truly ballasted road we had in this section, and I don't recall that the W. and A. had any ballast of any consequence until the N. C. and St. L. ballasted it after they leased it in 1890.

Q. Your knowledge about the damage done during that flood to the Western and Atlantic is confined to your recollection that for ten days the traffic was interrupted?

A. Yes, sir, I don't know anything about it tearing up the track, because I didn't see it. I know traffic was suspended.

Q. Do you know of any damage that was done in 1886?

301 A. No sir, nothing more than another suspension for a shorter time.

Q. Do you know whether that suspension was due to damage between Chattanooga and Boyce, or damage down beyond Boyce?

A. I understood it was general, most everywhere.

Q. General, most everywhere?

A. Yes, they had wash-outs and disturbances, track troubles all along that they had to repair.

Q. Do you know whether the Western and Atlantic road embankment or tracks, beyond Boyce, toward Atlanta, were damaged by the flood of 1886?

A. No, sir, I don't know. I don't know the extent of that or that they were.

Q. Where those tracks damaged during the flood of 1917, I mean beyond Boyce?

A. I really don't know.

Q. Now, as I understand you, the first effect of the high water is back water coming up from the Tennessee River South of Chattanooga, does that rise first on the Western and Atlantic side of the embankment of this right of way between Boyce and Chattanooga?

—. Mainly, though I imagine it rises on both sides.

Q. But does it or not?

A. It comes through the culverts and levels up all the way.

Q. And is it, or not, true that the Western and Atlantic embankment, that side of the embankment is on the side from which the back water comes in and it strikes that first?

A. The back water would reach it first, yes, and then pass
302 under the culverts there and level up all over the country, on both sides of the tracks.

Q. And so far as the action of back water is concerned it would have as much effect on the Western and Atlantic Railroad embankment on that side, as it would have on the other side, would it not?

A. Yes, sir, I think so.

Q. Do you know,—I am speaking now of the time of the floods that you mention, it not backing over the tracks, when the height is less than forty feet?

A. Back water standing on the fills, you are talking about?

Q. Yes, isn't it a fact that between the Cemetery and the Western and Atlantic embankment is a low place and water frequently stands there, even not in times of flood?

A. Yes, sir, there is a lagoon or pond there today, standing between the Western and Atlantic track and the Cemetery wall, the National Cemetery.

Q. So this back water reaches there first, that is the lower point, isn't it, it is lower on that side than on the other, the lagoon being there?

A. I imagine it is.

Q. And if any damage should be done the embankment at that point, on either side, it would be natural to *expent* it on that side?

A. Any damage from sinking and slides it would, yes sir.

Q. As I understand you to say, I think quite correctly the action of standing water or pure back water on any embankment is that the soil is simply wet and saturated and disintegrates due to
303 that saturation?

A. Yes, it don't tear down all banks, some banks stand it and some give away.

Q. Quite right, and this embankment of the Western and Atlantic along at that point has stood the action of that water, so far as you can recall back, has it?

A. I don't think there has been any trouble from that. My observation and information is that it has never been affected until the current tackled it.

Q. So, if this embankment of the Cincinnati Southern protects the Western and Atlantic at all, it is only in these times of flood you have mentioned, in 1886, and 1917, because it wasn't there in 1875?

A. It offers the greatest protection during the flood stages.

Q. Suppose the Cincinnati Southern had been built on its own right of way, beyond and adjacent to that of the Western and Atlantic between those points so that there would have been a fill of either side, leaving a space between, would or would not the embankment of the Cincinnati Southern have protected the Western and Atlantic fully as much as it does now by having been built continuously along as part of the embankment?

Mr. Colston: Objected to as irrele*l*vant and immaterial, and because the witness is not an expert on that point.

A. I should think that it would ruin both of them if that rapid current went over by following the hollow or ditch between them.

Q. But what I want to get your opinion of, Mr. Nixon, is this: If you have this embankment here and if, as you think, the current strikes that embankment in times of flood, would it not strike 304 it fully as much if it were not a part of the embankment of the Western and Atlantic Railroad?

Mr. Colston: The same objection.

A. Because if the two embankments were solid they would stand better than if they had a separation between them so that when the rapid current broke over that it would not efface that as much?

Q. You mean this: That a wider and heavier embankment would withstand the current more than a single embankment?

A. More than a single embankment. The first one would get the brunt, would get the force and the water would eddy after it crossed the first one, that is it would not have so much force, the current would not, as it would otherwise.

Q. That is exactly what I want to ask your opinion about, because if these embankments adjoined each other at the base, it being filled, they necessarily would be some distance apart at the top?

A. They are not built that way now.

Q. If that was built on its own right of way it must have been built that way. If you don't know that you can assume it. Under that condition of affairs, in times of flood, would not the Cincinnati Southern receive the brunt of the current, and would not this intervening place have afforded a place of eddy, broken the current, and would it not have afforded a greater protection than it does immediately adjacent to it?

Mr. Colston: Objected to as immaterial and irrelevant.

305 A. I do not think it would considering such rapid current, as interposed in this direction.

Q. It would unless it gave away, would it not, since the Cincinnati Southern side of the embankment would afford the protection?

A. Yes, as I say, it would take the brunt of the force.

Q. Would it not have afforded fully as much protection as it does now, so long as it stood at all?

A. No, I don't think so, because it would give it a chance to attack it if there was space between them.

Q. Now, Mr. Nixon, take the situation as it would be in time of flood, the flood stream crosses the Cincinnati Southern embankment, as long as it stands that would certainly receive the brunt of the flood and current?

A. Yes sir.

Q. Does not that give as much protection to any thing beyond as could be afforded, as long as it stands there at all.

Mr. Colston: We object to the question as immaterial.

A. If the second embankment was solid and jamb up against it, it would be stronger and be better protected.

Q. It would afford better protection to the nearer embankment, the Cincinnati Southern would be better protected?

A. It would protect both embankments if they were solidly built.

Q. Why, now, would a solid embankment protect the second embankment any more that a separate embankment, as long as that embankment stood?

306 A. Because the embankment would be solid and greater, have more strength, more force, and would not permit the current to dig or attack the second embankment.

Q. To make my mind clear, suppose this first embankment, instead of being built of clay or earth, was built of steel or iron and so constructed that it could not breat in a flood, would not that afford as much protection, if built separately and in front of the second embankment, as it would built right up against it?

Mr. Colston: Note the same *on*jection.

A. I hardly think so,—I hardly think so.

Q. Well, why not?

A. Because the water comes across the first embankment and will dig into the second embankment.

Q. Even though that intervening space is covered with water?

A. Yes, sir, even though it is full of water.

Q. Have you observed this situation out here in times of flood, high water, any of these floods, either 1917 or 1886?

A. Do you mean did I see the floods or current, or did I see the results?

Q. Did you see the effects of the current?

A. Yes, I have seen the current.

Q. But did you see the results?

A. I rode out through there but I did not see the torn up tracks that these other witnesses have detailed.

Q. Now, I want to ask you if, in time of flood, the water comes over the first Cincinnati Southern and then the W. and A., if the water beyond the W. and A. embankment is as high as the flood, would it do any damage to that slope of the embankment?

307 A. I can't imagine a condition of that sort because it never occur-ed, that it has been as high on the lower side as it is on the other as that current starts, and there never has been an opportunity to experiment on it.

Q. Was there any damage done on that slope of the Western and Atlantic embankment during either of those floods as a matter of fact?

A. I have understood there was, but I didn't see it.

Q. I want to know what you know about it?

A. I did not see it.

Q. You haven't seen any?

A. I have never seen the effects of these floods, I have only seen them in action.

Q. If you have not seen the effects of the floods, you are testifying theoretically?

A. I am giving my opinion, for which you asked.

Q. Well, these other gentlemen asked it and I wanted to get your opinion of it also.

A. Yes, sir.

Q. If you take a fresh embankment, a new one, it is very much more subject to saturation and disintegration by standing water or water with a slight current, than an old embankment, isn't it?

A. Yes, sir, I should think so.

Q. And if you take an old embankment that is well built and been there for half a century, that is covered with growth and vegetation, the action of back water on that would be very slight, would it not, or water with a slight current?

308 A. Well, that depends, that is somewhat uncertain. Now some embankments six years old seem to stand well and better than some others that are nearly forty years old.

Q. Why?

A. Well, water seems to get into some of them more effectively than others.

Q. Why?

A. I assume it is the material and perhaps the method of filling and packing, puddling when the fill was made.

Q. You mean the nature of the material and the character of construction?

A. Yes, sir.

Q. And, of course, age has a good deal to do with packing an embankment, has it not?

A. Well, age is valuable, but good work is better, to a certain extent.

Q. And the protection is even better, greater when the slope is covered with vegetation, isn't it?

A. Well, I should think so.

Mr. Wimbish: That is all.

Redirect examination

By Mr. Colston:

Mr. Colston: Without waiving objections taken to questions asked on cross-examination.

Q. A question put to you on cross-examination, as I understand it, was whether if the Southern Railroad, instead of being built where it has been built from Boyce to Chattanooga, was built just west of and parallel with the Western and Atlantic, parallel with the west line of the right of way of the Western and Atlantic and was

309 built of a fill,—now that would leave, would it not, a considerable space, hollow space between those two tracks wherever there were embankments isn't that correct?

A. I assume so.

Q. Now that way, if the roads were built that way, and the water broke over, and the water in time of flood would come up from the Tennessee River, would it not hit the embankment of the Cincinnati Southern first?

A. First, yes, sir.

Q. And when it flowed over the first embankment, it would fall, like water falls, would it not?

A. I should think with most effect against the next embankment.

Q. Would it not have a very injurious effect on the Western and Atlantic embankment?

A. I should think so.

Recross-examination.

By Mr. Wimbish:

Q. This current never sets in until the tide is above fifty feet and when it does set in there is no intervening space where the water would come in, but all of that space is covered by water?

A. In the neighborhood of fifty feet, yes. If that space is covered with water it is eddy water, soft water and——

Q. There is no fall there?

A. That don't make any difference, the strong current tearing over it would tackle or strike the second embankment.

Q. Mr. Nixon, if these rails are covered with a tide of forty or forty-five feet——

A. Forty-seven, seven,—forty-seven feet.

310 Q. That covers it several feet. We will say forty-five feet. If the current does not set in until there is a tide of fifty feet, how is it possible there could be any fall of water that comes over the nearer embankment of the Cincinnati Southern?

A. Because it is all eddy. That is the action of the river here.

Q. Did you ever see it do it?

A. Yes, sir.

Q. Have you ever seen that condition of flood?

A. I have seen rapid current cross there.

Q. But did you ever see a fall of water over——

A. The Big Tennessee River fall of water there forced through a narrow channel there it is bound to have forced, the water will cut over *of* across there——

Q. Yes, but what I am trying to get clear is, and I understood you to say in answer to Colonel Colston's question, that there would be a fall of water after it got over the embankment of the Cincinnati Southern, and strike against the other bank?

A. I did not mean to say it had fall, has force.

By Mr. Colston:

—. You meant to say force?

A. Force, yes, sir.

Q. How could the force operate?

A. From a greater body of water going through a narrow channel.

Q. The water would not go through the narrow channel, it would go over?

A. Yes, but it goes between these two hills.

Mr. Wimbish: That is all.

311 Frederick W. Wrampelmeier, a witness called on behalf of the defendants having been first duly sworn by the examiner testifies as follows:

Direct examination.

By Mr. Colston:

Q. Where do you live?

A. In Cincinnati.

Q. Are you a civil engineer by profession and practice?

A. Yes, sir.

Q. How long have you been a civil engineer?

A. About thirty years.

Q. Are you in the employ of the C. N. O. and T. P.?

A. Yes sir.

Q. You are in the engineering department of that road?

A. Yes, sir.

Q. How long have you been connected with them as civil engineer?

A. Why, I started in here November 1st, 1888, and have been here, I was gone, during that time, about five years that gives me about twenty-five years with the road.

Q. I show you this hydrographic sheet of the sub-station of the Tennessee River at Chattanooga, and ask you to state whether you com*pl*ied it or not (handing paper to the witness)?

A. It was compiled by another man, but I checked it,—I verified it.

Q. You know it is right then?

A. Yes sir, I went over and ver*t*ified the statements from the Government Engineer's office.

312 Q. That is the United States Government Engineer's office?

A. Yes, sir.

Q. Where, at Chattanooga?

A. Yes, sir, at Chattanooga, out in the City here.

Mr. Colston: I will ask him a few leading questions?

Mr. Wimbish: I do not object Colonel, go ahead.

Q. This hydrograph shows the stages of the Tennessee River at Chattanooga beginning with the year 1873, and ending with the year 1914, does it, that is correct?

A. Yes, sir.

Q. And it is based *in* the United States Government gauge of water in the Tennessee River at Chattanooga is it?

A. Yes sir.

Q. Now, as showing how this is to be read, will you take the column of figures on the left hand side of this paper as you look at it, and what do those figures indicate?

A. Why, they represent the height above zero, every line representing five feet.

Q. That is to say, each one of the horizontal lines, white lines, represents what?

A. Five feet above zero of the gauge.

Q. And the months running along the top of this, what do they show?

A. The different months in the different years.

Q. And this shows the stages of the water by certain months, indicated by the line at the top of the hydrograph does it?

313 A. Yes, sir.

Q. What is *here* to show the height of the water?

A. Well, the irregular line which shows wherever it occurs, the horizontal line- between these show the height.

Q. For example, we will take the end of April, 1874, what was the height of the water as shown by the hydrograph?

A. About twenty-nine feet, as near as you can scale it, above zero.

Q. This shows the irregular line coming up nearly to the thirty foot horizontal line, is that the way you read that?

A. Yes, sir.

Q. Take the year 1875, what is the highest stage of water shown by this hydrograph?

A. About fifty-four feet.

Q. At what time in that year?

A. The latter part of February and the first of March—About the end of the month.

Q. Now take, what is the highest water after that in March, 1875?

A. Well, about 28 feet,—not quite thirty.

Q. Well then, that teaches us how to read this, does it?

A. Yes, sir.

Q. Now, we will go, for example to 1877, take about the middle of the month of April, what does the hydrograph show the height of the water?

A. About 28—29 feet.

314 Q. Well, now we will come to the year 1880, in March 1880, what does—no before that will come to the year 1879, in January, what does the hydrograph show the height of the water?

A. About 38 feet.

Q. And in March 1880?

A. About 38 feet.

Q. And we will say in 1882, January, what does it show?

A. Slightly over forty feet.

Q. Now take 1884, March of that year, what does it show the height of the water?

A. About 43 feet.

Q. Now take 1886, the month of April, what does it show the water then?

A. About 52 feet.

Q. About 52 feet, and so on. With those illustrations any body can read this and tell what it was?

A. Yes, sir.

Q. The next high water of any consequence was 1890, what does that show was the highest, and in what month?

A. About 42½ feet in March.

Q. And in 1891, what is the highest shown on this hydrograph?

A. About 39 feet.

Q. Well, take 1892, what is the highest?

A. About 37 feet.

Q. When we come to 1896, what does that show?

A. A little over 40 feet.

Q. Now we will come to the year 1897, what is the highest and in what month?

315 A. About 38 feet in March.

Q. Now in 1899, take the month of February, what was the height of the water then?

A. About 37½ feet.

Q. And in March of that same year?

A. A little over 40 feet.

Q. Now we will come to the year 1900, what was the height?

A. About 24 feet in February, 1900.

Q. Going to 1901, what was the highest?

A. In August it was about 33 feet.

Q. Now we come to 1902?

A. In January, slightly over 40 feet.

Q. Now in 1903, what was the highest?

A. A little over 31.

Q. Well, then there is no high water over 1904, 1905—we will pass that over to 1906?

A. About 33 feet in 1906.

Q. We will pass to 1911, what was the highest?

A. About 29 feet.

Q. In 1912, what was the highest?

A. About 31 feet.

Q. In 1913, what was the highest?

A. About 32½ feet.

Q. That was in what month?

A. The latter part of March.

Q. Now the high water in 1914, shown on this?

A. About 33 feet in December.

Q. Now, I presume you know the height of the water by this same gauge in 1915?

A. I think I have it from the book here,—1915, it was 34.4
316 in December.

Q. How about 1916?

A. 1916, it was 32.9 feet in January.

Q. Was that the highest?

A. Yes, sir.

Q. Now, 1917?

A. It was 47.7 feet in March.

Q. You don't know how it was in 1918?

A. I have February, 42½ feet. These were taken from the weather — here in Chattanooga.

Q. Mr. Wrampelmeier, have you got the original profile of the Cincinnati Southern Railway from Boyce Station to Chattanooga when it was built?

A. Yes, sir.

Q. On which it was built between those points on the right of way of the Western and Atlantic?

A. Yes, sir.

Q. Let me see it, will you?

(Book produced by witness.)

Q. Is this one of the records of the Cincinnati, New Orleans and Texas Pacific Maintenance Department?

A. Yes, sir,—well the Engineering Department,—the original profile of construction of the Cincinnati Southern.

Q. That begins at Boyce Station to Chattanooga?

A. Well, it begins way beyond Boyce.

Q. But it does show it from Boyce?

A. It shows from Boyce to Chattanooga but it starts way up yonder,—there are four or five of these that take in the whole road, but I just brought down the part between Boyce and Chattanooga.

Q. On this original profile that we are talking about now,
317 I see that there is written in pencil "H. W. April 3, 1886"
and then a line running to a mark representing "*x*," I will ask you to state, if you know, whose handwriting that is?

A. Colonel Nicholson's the former Chief Engineer of the road.

Q. Where is he now?

A. He is dead.

Q. How long has he been dead?

A. I think it was 1907, when he died. I am not exactly sure, 1906 or '7.

Q. What does that indicate, how high that water was on the 3rd day of April 1886?

A. He says it was 25½ inches below the base or rail and points — the mile post.

Q. What mile post?

A. Mile post 331.

Q. What does that mean with reference to the government gauge, — was the height of the water, do you know?

A. No, but I can tell—(referring to hydrpgraph) well that was *that* 52 feet, that was the height of the water that they had in 1886,—that represented the 52 foot stage in Chattanooga on the gauge.

Q. Now I will ask you to state what this means. There is a line drawn by pencil and on that line is written "Water, April 1st, 1886," what does that mean with reference to the height of the water above the track?

A. Well, I take that to be a note put there by Colonel Nicholson to show that the water was about three feet over the grade at that point, this April 1st. That is marked April 1st and April 3rd was at the highest point, so that was a little previous to the highest point.

318 Q. At what point on the road, would that be?

A. Well that would be about, I should say, about half a mile south of Boyce depot.

Q. What other notes are there here of that kind, do you know?

A. There are several of them, there is one down here near the big fill at Citico creek, says, "High water two feet below track *on* February '90," in the year 1890.

Q. What other places are there, do you know?

A. There is one here, he says "High water April '86, C. S. roundhouse, April '86, was three inches above top of three."

Q. Does that profile show the embankment and the cuts between Boyce Station and Chattanooga?

A. Yes, sir.

Q. Have you made up how much, how long in feet the embankments are,—I do not mean each particular embankment, but how much embankment it does make?

A. *O* could not say exactly, I did not do that but if you want that all there is to do is to add it up from the profile and you can tell. I couldn't tell you off hand, there is over a mile of it anyway, I should say roughly.

Q. Well, does this profile show the crossing over the Western and Atlantic track from the west side to the east side?

A. Yes, sir.

Q. Where is that crossing located?

A. Station 13573 plus 94 the note here says, and it is in Colonel
Nicholson's hand writing, 2,882 feet north of the north line
319 of Market Street, Market Street is 2,883 feet south of the
W. and A. crossing.

Q. And that crossing is indicated on this profile?

A. Yes, sir, this locates the crossing of the W. and A. 2,883 feet north of Market Street.

Q. That is the original profile?

A. Yes, sir.

Q. Made up as the road was at the time it was built from Boyce in?

A. That was made up by the engineers when the road was built.

Q. And that indicated that crossing at that place?

A. Yes, sir.

Q. Did I ask you to look at that crossing with reference to the map that is attached to the bill of complaint in this case?

A. Yes, sir.

Q. Now, on this map attached to the bill of complaint there is mile post 136, did you locate that crossing on the ground with reference to that mile post 136?

A. Yes, sir.

Q. Where would it be with reference to that?

A. It would be 785 feet north of mile post 136.

Q. That is toward what we call East End Avenue, from there?

A. Yes, sir.

Q. Could you tell what it would be with reference to the north end of what is marked on this map attached to the bill of complaint as 1750 feet encroachment of the Cincinnati Southern Roilway?

A. Well I could not exactly because that didn't show how
320 far that is from the mile post. It is about where the crossing is.

Q. What?

A. That 1750 feet.

Q. That is the north end, of the 1750 feet begins about where?

A. About where the crossing is, very close. You see that don't show how far the 1750 feet was from the mile post. If it did that I could tell exactly.

Q. But you would say that crossing lead over up about the north end of that 1750 foot encroachment?

A. Yes sir, very close to it.

Q. When that crossing was actually in existence were you familiar with this location?

A. Yes, sir.

Q. And could you locate it, did you see the ground today?

A. I saw the ground today, yes sir.

Q. Could you recognize where that crossing was by looking at it today?

A. Well, I could not see right on the spot.

Q. Well, approximately?

A. Oh, approximately it would be about there.

Q. About where you said?

A. Yes, sir, about 2883 feet from the north edge of Market street. Of course there have been some changes in the track since that was taken and I could not tell exactly.

Q. I ask you to make me a tracing showing where the water would come up on the embankment of the Cincinnati Southern Railway
between Boyce Station and Chattanooga at certain flood stages
321 of the river, have you done that.

A. Yes, sir. (Producing paper).

Q. I will ask you to look at that and tell us what that tracing indicates,—in the first place where did you begin?

A. In the first place I have made the red line here to show, the solid red line represents the base of rail on top of the ties of the Cincinnati Southern Railway from Boyce Station to one thousand feet above the W. and A. crossing, old crossing about oposite to the roundhouse.

Q. What stages have you taken to begin that, the lowest?

A. As the lowest I have taken the stage of 16 feet above zero of the gauge.

Q. What embankment does that touch?

A. Touches the embankment at what is called Citico starts this—just south of the Southern Railway overhead crossing.

Q. How high would that come up onto that embankment?

A. It would just come up to the foot of it, may be a foot or so.

Q. How long is that bank, lineally?

A. At that height, six or seven hundred feet.

Q. So with a sixteen foot stage of water in the Tennessee River, there would be for a length of six or seven hundred feet,—it would come up on that embankment for a distance of six or seven hundred feet how high?

A. Why it would just barely touch it.

Q. Take the next stage of water?

A. The next stage was twenty-eight feet above zero.

322 Q. That touches how many?

A. Well, it touches six of them.

Q. All six together, could you tell about what length of embankment it would come up on?

A. At twenty-eight feet it brings the water up on the embankment for 1300 feet,—1350 feet counting all six different places, there would be 1300 to 1350 feet.

Q. How high would it come up on that length of embankment?

A. Some of that would be five feet and on the big fill it would be as much as fifteen feet.

Q. Now, take the next water line?

A. The next one I took at thirty-eight foot stage.

Q. How high would that come up on the embankment, and how much embankment would it come up against?

A. Well, it would come up from one to twenty-two feet for 7370 feet.

Q. Now go to the next one?

A. The next one I took at 43 or 44 stage,—43 foot stage is what I have got here. That brings it up you might say, to the top of the ties and the base of the rail.

Q. All the way along?

A. For about a mile.

Q. For about a mile?

A. Yes, sir.

Q. Then what is the next?

A. The next stage that I took was 52 feet, which was the high water of 1886. That took it up to—well that was over the track about from about 9 feet—about 1700 feet south of Boyce and from a point about—well clear on down to Chattanooga.

323 Q. Over the tracks what depth of water?

A. From nothing to nine feet, up near Boyce where the road was high it just barely touched the track.

Q. What is the next?

A. I haven't got the stage of the water here, highest ever known, that was in 1867. This was taken from the weather bureau statistics, which show a stage of 58.95. That highest along there would be within three or four feet of touching the Southern overhead bridge,—the overhead bridge of the Southern. That was the stage of water of 1867.

Q. Is this profile from which you have just testified taken from the records of the Cincinnati, New Orleans, and Texas Pacific as they are in the Engineer's Office.

A. Yes sir, it was compiled from our records, from what we had in our office.

Q. And the record from which it is compiled is before you now?

A. Yes, sir.

Q. I show you a map now that is entitled—a blue print,—"Queen and Crescent Route." "Map showing railroads in the vicinity of Chattanooga, Tenn." "Scale 1. to 2000" "February 15th, 1911," which is drawing No. 292. Did you make that up and do you know whether it is correct or not? (handing paper to witness)?

A. Yes, sir, I made this up from the records in the office, tracings.

Q. Does this show the Western and Atlantic Railroad?

A. Yes, sir, *is* a general way.

Q. It shows the Cincinnati, New Orleans and Texas Pacific Railway?

324 A. Yes, sir.

Q. From Boyce to Chattanooga?

A. Yes, sir.

Q. Does it show the proper relation those two railroads occupy to each other?

A. Relatively, yes, sir.

Q. Now, coming down here to what is called the C. N. O. and T. P. Railway, Citico yard, is that a correct representation then of those yards?

A. Well, there has been more tracks added since that map *eas* made, considerably more tracks in there now, but that is about the location of the yards.

Q. Each one of these small white lines in the region of the C. N. O. and T. P. Railway at Citico yard indicates a track?

A. Yes, sir.

Q. Those tracks, since 1911, have increased instead of diminished, is that so?

A. Yes, sir, there are more tracks in there now *that* than there was then.

Q. Now, you have got a place here marked W. and A. Freight depot, 9th Street, N. C. and St. L. Freight depot, that shows the Western and Atlantic depot and the Western and Atlantic freight depot in Chattanooga does it?

A. Yes, sir.

Q. You have got here "New Terminal Station" marked does that show the passenger station at Chattanooga of the C. N. O. and T. P.?

A. Yes sir.

Q. And of the Southern Railway Company, is that right?

A. Yes, sir.

325 Q. Well then, whatever is shown on here is correct is that right?

A. Practically, yes, sir. It is as near as you can make it on a map.

Mr. Colston: I am going to offer it in evidence *at* Exhibit 2, do you wish to see it, Mr. Wimbish:

Mr. Wimbish: No sir, but I would like to have a copy.

Q. Can you make a copy, Mr. Witness.

A. Yes, sir.

Admitted in evidence and marked defendant's exhibit No. 2.

Mr. Colston: You can examine. I may not have asked all the questions I wanted to ask because I have not made a memorandum.

Cross-examination.

By Mr. Wimbish:

Q. I do not — that I quite understood your reference to the notation of your engineer on the original profile that you presented. What was the highest stage of water shown there in 1886?

A. This shows it $25\frac{1}{2}$ inches below the base of rail at mile post 331. That was the high water of 1886.

Q. That was the highest point?

A. That is what he located it at that particular point.

Q. Where is that particular place?

A. Well, it is about thirteen—between thirteen and fourteen hundred feet south of Boyce depot.

Q. Does that correspond with your profile showing 52 feet gauge?

A. Yes, sir, practically.

326 Q. Then you heard these witnesses testify that they came in from Boyce to Chattanooga in a boat over the right of way of these roads, with the telegraph poles on both sides; how is that possible with that stage of water being below the rail?

A. Well, right at that point, at that particular point, but there is a grade in our track there. If you go out here just a little beyond that mile post, there *if* half a foot in a hundred, or .46 in a hundred, practically half a foot in a hundred. Now if you go four hundred feet from that you will be down two feet lower, so there you would begin to have the water over the track, four hundred feet south, of that mile post there.

Q. I understand, but you haven't got continuous water from Boyce to Chattanooga over the tracks of the Cincinnati Southern to float a boat?

Mr. Colston: That date.

Mr. Wimbish: I understood him to say, in response to your question, that that was the highest stage of water in 1886.

Mr. Colston: No sir, he didn't say that.

Q. *What* that the highest stage of the water?

A. It says April 3d 1886.

Q. You have a chart in here showing the high state of the water, when was that high stage of the water in 1886—you have got a blue print showing that?

A. The exact date is not marked, it was in April,—it is in the first part of April, 1886.

327 Q. How near to this date. I want to find out if they correspond? How your records correspond with those you read from.

A. About the same time. I haven't got the date marked on here, I have just got it generally the first of April, I could not divide this up into thirty days, it is sketched in here and shows near the first of April, this high*t* water, I think it was on the third.

Q. Does not your chart here show that the high water was on the third of April, 1886?

A. Yes, sir.

Q. Does not that notation show the third of April, 1886?

A. Yes, sir, 52 feet.

Q. Did it come over the tracks or not?

A. Not at that point it did not, no sir, not at that point, but four hundred feet south of there it does because that track is on a grade right at Boyce and the ground is higher. The 1886 flood did not come over the track right at Boyce Station.

Q. But that is not at Boyce station, is it?

A. No, it is just a little south.

Q. How much?

A. Thirteen to fourteen hundred feet.

Q. That is a quarter of a mile, isn't it?

A. Yes, sir, about.

Q. Doesn't that chart show that at a 50 foot stage, it would come over your tracks all the way excepting, perhaps, right at Boyce?

A. Fifty foot stage?

Q. Fifty-two foot stage.

A. Yes, sir, my chart shows it right, but right here is where there
is what I said it occurs right here about thirteen or fourteen
328 hundred feet south,—here is the Boyce depot, my chart shows
that exactly.

Q. Well then, these gentlemen could not have come all the way from Boyce to Chattanooga in a boat, in 1886?

A. Not over the track they could not, but they could come on the side of the track.

By Mr. Colston:

Q. Inside of the telegraph lines?

A. Yes, sir, inside of the telegraph lines, they could, but right at Boyce they *n*ight not have been over the tracks. I wasn't here then.

By Mr. Wimbish:

Q. How much of your track was covered in 1917?

A. I don't know, I wasn't down here. According to this chart the water ought to have been just about up level with the tracks, that would correspond with a forty-three foot stage of the water, that would bring the water just about up level with the top of the rail.

Q. When the height of the water is forty-seven and something, there is testimony that the water was all over these tracks at that stage, what can you say whether that is true or not, in your opinion?

Mr. Colston: We object to that question as immaterial.

A. I was not here. I could not say. I did not see it.

Q. Would a forty-seven foot stage line submerge your tracks all the way from Boyce to Chattanooga, except the high ground at Boyce?

A. No, sir, a forty-seven foot stage wouldn't·

Q. Would not cover that track.

329 A. No, sir.

Q. How much of your track would it cover, that is lineal distance?

A. I could not say.

Q. Well, can you from your plat there?

A. You see a stage,—there would be more or less fall in the water now you may take the water up at the Tennessee River Bridge and take the water down here there would be a certain amount of fall in the water, sometimes it is more than other times. It depends a good deal upon the current.

Q. Now the heights you have given, those gauges, where are they taken, are they taken at the bridge or taken down here over the tracks?

A. This shown on here, (indicating)?

Q. No, show- on your blue print?

A. On the hydrograph?

Q. Yes?

A. Those are taken from the Government Engineers.

Q. At what point were they taken?

A. Well, that was the high water at the gauge.

Q. Where is the gauge?

A. The gauge *it* up here on the river, I believe near Look Out Street,—I think they call it, I don't know exactly where it is, but that is where they told me it was, near the head of Market Street, there on the river, I believe right near Market Street.

Q. Well, as I understand yo uthat would not correctly measure the height of the water over this right of way?

A. Not exactly.

330 Q. What would be the variation?

A. I could not say exactly.

Q. How much, approximately?

A. I would say it might be one or two feet, I don't know.

Q. Does not your chart here show that a forty-three foot stage will practically come up to the base of your rail, practically all of the distance?

A. Not all the distance.

Q. I did not say all, practically all,—a substantial part of the distance?

A. Yes sir, from our records, from these records, assuming that,—from our records forty-three foot stage ought to bring it up to about the level of that track.

By Mr. Colston:

Q. For what distance between Boyce and Chattanooga?

A. About a mile, I think it was I had on there, for a mile it would bring it up right close to the top of the ties, just about level with the track.

Q. For about a mile in distance?

A. Yes, sir.

Q. And that would be towards the lower end?

A. Well, that would be about between, you might say between mile post 332 and 333, practically between the two, practically about a mile.

Q. What is the mile post on the Cincinnati Southern south of Boyce?

A. The one nearest to Boyce is 331.

Q. Then it comes on down to Chattanooga?

A. Yes, sir.

331 By Mr. Wimbish:

Q. What damage, if any, was done to the tracks, to the embankment or tracks of the Cincinnati Southern Railway, or the Western and Atlantic, at any stage of the water less than fifty feet?

A. What damage was done?

Q. Yes, so far as you know?

A. I wasn't down here, I didn't see it, I couldn't tell you.

Q. I do not mean any particular time, but you have shown here various periods when the water was 16 feet and up?

A. I show on there every stage from the stage of 16 feet above zero on the gauge would come up on the embankment.

Q. Yes, and then that hydrograph shows when the water was higher than that?

A. Yes sir.

Q. Shows *if* frequently higher than that?

A. Yes, sir.

Q. Almost every or nearly every year, what damage was done to your embankment by those stages of water less than fifty feet?

A. I wasn't here to see, I have never been here in high water.

Q. You were never here when the water was above 16 feet?

A. Oh yes, I have.

Q Was any damage done?

A. None that I know of, except the reports we have filed giving the water, except the wash-out north of the Tennessee River and Hixon, but I didn't come down then. 332

Q. I am speaking of between Boyce and Chattanooga?

A. I did not see any, I wasn't here in the high water of 1886, I wasn't with the Company.

Q. I am speaking of these various periods of tide when the water was 16 feet and over. You say those have occurred almost every year, and I asked you what damage, during all those years, was done to the embankment or tracks of the Cincinnati Southern or the Western and Atlantic when the tide of water was less than fifty feet high?

A. Well, I don't know that it had done any damage except the subsiding of the fill and our tracks would go down and we would have to raise them that amount. That always happens on all fills when they get saturated with water and sink down, we have to fill them up again and get them up the surface.

Q. Have you embankments of the Cincinnati Southern on your right of way between Boyce and Chattanooga, have you fills in there, I mean?

A. Between Boyce and Chattanooga?

Q. Yes?

A. Have we any embankments?

Q. Have you any fills, is it all level ground or have you fills along there and cuts?

A. Have fills and cuts both, the profile shows that.

Q. About how much of that distance is on fills?

A. I could not say off hand. I expect—I don't know exactly but you can take the profile and count it up.

333 Q. I would like you to give me that evidence, you are an engineer and you are testifying on this subject and I would like to know and I would like to know accurately, and I would like to know the average depth or height of those fills.

A. I can tell—you want to know the total length of the fills?

Q. I want to find out how much of your embankment is exposed and would be affected by high water?

A. (After calculation.) Why, pretty near three miles, I guess, of fills.

Q. Yes, and what is the height or depth of your greatest fill?

A. From the very lowest point you mean, at Citico Creek, or do you just want the average? About thirty-two feet, the deepest one we have.

Q. Now, at what point is that?

A. That is down here at Citico Creek, that is just south of the Southern overhead crossing.

Q. What is the average height of that fill?

A. The average height of that fill is about 28 feet.

Q. Could you tell me the average height of fills taken as a whole, for this three miles?

A. No, sir, I could not.

Q. I want to ask you to figure that up for me, if you can give it?

A. No sir, unless I can add it up.

334 Q. What is the width and length of the encroachment or occupation, what ever you choose to call it, of the Cincinnati Southern of the right of way of the Western and Atlantic Railroad coming into Chattanooga,—you have testified about this crossing down *down* here and about coming on into your roundhouse over the crossing, and I want to know how much of that distance you are on the Western and Atlantic Railroad right of way, and the width of it?

A. You mean from Chattanooga up to the crossing?

Mr. Colston:

Q. No, he means from the crossing south to Chattanooga?

A. I should say between seventeen and eighteen hundred feet.

By Mr. Wimbish:

Q. About how wide is it?

A. Well, I could not say exactly, it varies. It will vary from one to I don't know how many feet. I never measured it and I could not say.

Mr. Wimbish: That is all I believe.

Redirect examination.

By Mr. Colston:

Q. How long have you known those tracks to be in that same location on that seventeen or eighteen hundred feet, for how many years?
A. Oh, they have been there I could not say exactly. They must have been ther- at least fifteen years—twenty years or more. I don't know how long—they probably have been there ever since the railroad was built, I could not say.
Q. Ever since the Cincinnati Southern was built?
A. Yes, sir. I don't know whether they have been there that long or not, there have been some changes made around there, and I don't know just what changes have been made.
Q. But they have been about the same location?
A. Yes, sir.

335 Mr. Colston: That is all, you are excused.

Thereupon an adjournment was taken until 8 o'clock p. m., hearing to be resumed at the office of Judge Allison, in the Hamilton National Bank Building at that hour.

336 Hami*n*ton National Bank B*l*ui-ding.

Chattanooga, Tenn.,

March 22, 1918—8 o'clock p. m.

Pursuant to adjournment hearing proceeded.

Curtis Daugherty, a witness called on behalf of the defendants, having been first duly sworn by the examiner, testified as follows:

Direct examination.

By Mr. Colston:

Q. Mr. Daugherty, state what your position is now?
A. Chief Engineer, Maintenance of Way and Construction, Southern Railway System, Lines West.
Q. You are Chief Engineer of the Cincinnati, New Orleans and Texas Pacific Railway Company?
A. I am.
Q. How long have you been such?
A. About 18 years.
Q. You are a civil engineer by profession.

A. I am.

Q. How long have you been a civil engineer?

A. 33 years.

Q. How long have you been practicing civil engineering on railroads?

A. About 32 years.

Q. What are some of the railroads you have been civil engineer on?

A. The Cincinnati, New Orleans and Texas Pacific; Alabama Great Southern, and the Southern Railway, and prior to 1907 I was employed on the Illinois Central Railroad in the Operating Department as Superintendent, Road Master and Assistant Engineer.
337 Prior to that time of the Wisconsin Central Railroad as Assistant Engineer.

Q. You know the track of the Western and Atlantic and of the Cincinnati, New Orleans and Texas Pacific from Boyce into Chattanooga?

A. I do.

Q. How long have you been familiar with that situation?

A. A little over eleven years.

Q. I will ask you to state what difficulty there is, if any, in trains passing on the Western and Atlantic Railroad and the Cincinnati, New Orleans and Texas Pacific between Boyce and Chattanooga?

A. I have seen a great many trains pass on both of those roads and I have never observed any difficulty.

Q. What is the distance between the centers of those tracks?

A. Fourteen feet from center to center.

Q. What is considered the ordinary practice of railroads as the proper distance between center and center?

A. Thirteen feet is quite general over this country.

Q. Mr. Hunter McDonald, the Chief Engineer of the Western and Atlantic Railroad testified in this case to certain disadvantages that resulted from the proximity of the Western and Atlantic track to the track of the C. N. O. and T. P. Railway Company between Boyce and Chattanooga, and he said the disadvantages are the confining of the operation of maintenance, such as putting in cross ties, practically to one side of the track that the men in maintaining the road bed, putting in ties and getting out of the way of trains, have to look out for the trains of the Cincinnati Southern on their track, that on account of these trains adjacent to the Western and Atlantic
338 track, it is safer to have the tracks farther apart, and the presence of the embankment and the placing of the two roads necessitated the drainage of the track entirely to one side and the drying out of the road bed would be quicker if it could be drained on both sides, etc. I will ask you to state what practical drawback does exist, if any, owing to the fact of the two tracks being situated as they are and having a common embankment, so to speak?

A. Practically I do not regard the disadvantages mentioned by Mr. McDonald as being at all material. There is no particular disadvantage in the necessity of renewing ties entirely from one side of the track. They can be as economically and satisfactorily renewed from one side as from both. Occasionally there may be a tie that would come out a little easier on one side than the other, but the disadvantage that he speaks of is entirely overcome by the proper handling of the work of tie renewals which does not amount to any additional expense. Merely foresight on the part of the track force in handling their work.

Q. What impediment to the drying out of the road, if any, would result from the using the common embankment, such as is used there?

A. There is a little difficulty in disposing of the water that falls on the roadbed in the case of two or more tracks lying side by side that does not exist with a single track, but that is a very small item in my judgment. It is true, of course, that the presence of the Cincinnati Southern track along side of the W. and A. track makes it necessary for some watch to be kept in order to avoid injury to track men working on the W. and A. track from trains on the other track. That again is a matter that only requires attention on
339 the part of the foreman, and does not involve any particular expense.

Q. Does not involve any unusual danger?

A. Not if the foreman in charge of the men keeps the proper lookout.

Q. Well, now what, in your judgment, was the advantage to the Western and Atlantic right of way in having the Cincinnati Southern build on a common embankment with it from Boyce to Chattanooga?

A. It improved the support of the Western and Atlantic track on its sub-grades, particularly on the embankments where the expenses of maintenance of track depends to some extent on the stability of the embankment, and a wide embankment is more stable than a narrow one. In addition to that the Western and Atlantic road was relieved of the Maintenance of one side of these embankments. The embankment shrinks, the sides are eroded by rains and storms and require some expense to maintain it in its full width. The construction of the Cincinnati Southern along side of the W. and A. relieved the W. and A. of any expense on that account so far as one side of their embankment is concerned.

Q. Upon whom is that expense cast on the present arrangement?

A. That enpense falls on the Cincinnati Southern, or the operating company.

Q. What is the distance between these two tracks, the Western and Atlantic and the Cincinnati Southern?

A. They are substantially nine feet between the nearest rails.

Q. And between the centers?

A. Fourteen feet.

340 Q. Now what is the correct situation, the width of the right of way occupied by the Cincinnati, New Orleans and Texas Pacific, as to being 23½ feet or 26 feet?

Mr. Allison: You admit, Mr. Wimbish, that there is no physical encroachment with the track of the Cincinnati Southern, any nearer to the Western and Atlantic than it was authorized?

Mr. Wimbish: That is on the side authorized?

Mr. Allison: Yes.

Mr. Wimbish: Yes, I think so. That is in so far as it is laid on the side authorized by the act.

Mr. Allison: On the west side.

Mr. Wimbish: Of course that does not refer to the encroachment on the other side.

Q. (Continuing:) I speak of the right of way on the West side of the Western and Atlantic Railroad track?

A. $23\frac{1}{2}$ feet, is the width of the strip actually occupied.

Q. Now, that portion of the right of way that would lie between a line drawn seven feet west from the center line of the Western and Atlantic track and a line drawn nine and one half feet west of the center line of the Western and Atlantic track, is that occupied by the Cincinnati, New Orleans and Texas Pacific?

A. It is occupied by some ballast that, no doubt, was placed there by the C. N. O. and T. P. or at least partly so occupied—that two and a half foot strip is occupied by ballast part of which was placed there by the W. and A. and part by the C. N. O. and T. P.

Q. That is to say, that ballast on that two and a half foot strip is common ballast placed between the two roads is it?

341 A. Largely so, yes sir. The practical working out of the maintenance of the two tracks as between the forces of the two companies has gradually drifted into a situation where each—the force of each company bears the expense for that company to a half way line between the two tracks.

Q. That is to say, there is a median line is there, between the two tracks, up to which the force on each side works, is that the idea?

A. That is the idea.

Q. Well, that is the limit of the occupancy, is it?

A. That is the limit of the occupancy.

Q. I will ask you whether this is a correct statement, and I will read from the answer of the defendants in this case: "Defendants say that in maintenance of ballast on said embankments, between the two road-beds and keeping the said space free from litter, it was the agreed practice between the two roads to observe a median line between the two road-beds, and in the exercise of such practice the track forces of the Cincinnati Southern Railway worked out side of the limit of the grant made by the State of Georgia to the Cincinnati Southern Railway", is that a correct statement?

A. It is a correct statement, except so far as the agreed practice is concerned, it is not covered by any formal agreement, this practice just grew up in the work of maintenance.

Q. It is a practice for convenience, then?

A. For convenience.

342 Q. Was the grade that was used by the Cincinnati Southern Railway over this right of way that was granted by the State of Georgia, the same as that of the Western and Atlantic?

A. Yes, sir.

Q. How did they make that grade the same, how was it done?

A. The grade of the Western and Atlantic was already established when the grade of the Cincinnati Southern Railway was made, and in making the grade the Cincinnati Southern Trustees merely brought their grade to the same elevation as that of the Western and Atlantic at all points.

Q. That was done by just filling out the embankment that was already there to the required width to accommodate the Cincinnati Southern Railway?

A. That is practically the way it was done.

Q. Now, there is a 1750 foot strip spoken of in this Bill of Complaint, on the East side of the Western and Atlantic Railroad and it is sworn we occupy that for a width of 26 feet. Now is that occupancy 26 feet in width, or 23½ feet except at the beginning and ending point?

A. Well, it is on the same basis that the balance of it has been described and considered, the occupancy there would be and is 23½ feet at its maximum width.

Q. Well, now according to what you know and according to what you have learned from the records of the Cincinnati, New Orleans and Texas Pacific Railway Company how long has the Cincinnati, New Orleans and Texas Pacific Railway Company occupied that 1750 foot strip on the east side?

343 A. Up to the present time?

Q. Well, up to the time, we will say up to the time of the commencement of this suit, which was in April, 1917?

A. Why, a period exceeding thirty-five years.

Q. What do you know about the location of the original crossing of the Cincinnati Southern Railroad, from the west side of the Western and Atlantic Railroad to the east side of the Western and Atlantic Railroad?

A. It was in existance at the time I began service with the C. N. O. and T. P. So far as I recall at present, I recall its location, that is in a general way and had occasion to know about it because I helped to plan the change in location.

Q. Yes, well, where was that, what do you know about the Crossing in its original condition?

A. Well, of course in the very original condition the condition in which it was first installed, I don't know. That was before my time, but I was familiar with it before its location had been changed, though some slight changes had been made in the details of the crossing itself.

Q. But while it was in the same location?

A. But while it was in the same location.

Q. Well, what were those changes in the details, of that original crossing?

A. When I first saw the crossing it was constructed according to what is termed, in track language, a double slip crossing, which serves the purpose not only of a straight across crossing of tracks but also of a switching connection from one to the other. The records show that the original crossing was constructed on a plan of

344 what was known as "switch in and switch out" arrangement, which was merely and simply switches. That seems to have been later replaced by this more modern crossing, a double slip crossing, and that change was merely to a little more modern method of doing the same thing.

Q. What was the location, now, of the terminal facilities on the east side of the Cincinnati Southern originally with reference to this crossing and with reference to the tracks running from that crossing, on the east side of the Western and Atlantic Railroad?

A. The property acquired by the Cincinnati Southern provides for terminal facilities at Chattanooga laying to the east and south of the right of way of the Western and Atlantic and extending from a short distance north of this crossing, in a southwesterly direction to Market Street, and entirely on the south and east of the Western and Atlantic Railroad.

Q. What was that crossing used for, going to what place?

A. The crossing was used for the purpose of getting from the main track of the Cincinnati Southern, as it was located and constructed and used, on the west side of the Western and Atlantic over to this terminal property, which was on the east side of the Western and Atlantic, necessarily a crossing of the Western and Atlantic had to be made in order to accomplish that.

Q. Were these tracks that you speak of as being on the east side of the Western and Atlantic connected with that crossing, at that crossing?

A. They were.

Q. They were, then, practically a part of that crossing?

345 A. The track that,—the Cincinnati Southern Track that crossed the Western and Atlantic at this crossing led to these other tracks by switch connection.

Q. And those tracks led to the terminal facilities on the east side?

A. Exactly so.

Q. Now there is an interlocking crossing where is that located?

A. Some distance, probably a thousand feet north in railroad parlance, of the original crossing.

Q. If is about East End Avenue, is it?

A. It is near East End Avenue, what we know as the East End Avenue interlocking plant.

Q. Well, that accommodates the tracks crossing from the west side to the Western and Atlantic over to the east side and leading into the terminal passenger station at Chattanooga, does it?

A. Into the terminal passenger station and also into the same terminal property.

Q. Yes, and to those same tracks that were on the east side?

A. The same tracks that were on this east side. They have been extended up to this East End Avenue interlocking crossing.

Q. There has been testimony put into this case, and it is aver-ed in the answer of the defendants in this case that the Cincinnati Southern Railway owns a right of way west of and adjoining the Western and Atlantic 66 foot right of way considering it to be that wide for the present, do you know when that was acquired?

346 A. The most of it was acquired in the year 1879.

Q. I will read you this statement from the answer of the defendants and ask you to state whether it is correct or not, I refer to page 15 of the answer: "Defendants aver that prior to the passage of said act of October 8th, 1879, to wit, on June 28th, 1879, the Trustees of the Cincinnati Southern Railway had actually located the Cincinnati Southern Railway between Boyce Station and its Chattanooga terminus and had selected therefor a route parallel with and adjoining the Western and Atlantic Railroad's right of way for that distance, and had secured a right of way for said route?"

A. That is correct, according to the records in my office.

Q. No line, no railroad has ever been built, however, on that line?

A. Not throughout its entire length, no sir.

Q. I will ask you if this is a correct statement about the width of the right of way: I read this from the answer of the defendants, beginning on page, at the bottom of page 17: "They (the defendants) say that said right of way, for its greater distance, is only one hundred feet wide, and for the most of the remaining distance is only a hundred and fifty feet and for 1115 feet in length it is only 200 feet wide, and for 1200 feet the width varies from one hundred feet to fifty feet." Is that correct or not correct?

A. That is correct. The strip fifty feet in width is at the extreme south end of the right of way which the Trustees purchased on the West side of the Western and Atlantic Railroad, that is the Chattanooga end.

347 Q. Now, had the Cincinnati, New Orleans and Texas Pacific Railway Company built any railroad yards on this right of way west of that which was granted the Trustees of the Cincinnati Southern Railway by the State of Georgia prior to the beginning of this suit?

A. They had. On the south most part of it and extending from this south most end, which was at or near the point of crossing, the original point of crossing of the two roads in a direction towards Boyce for a distance of about two miles, perhaps a little less, the Cincinnati, New Orleans and Texas Pacific Railway Company had constructed on this land a system of *traps* for yard purposes.

Q. How long had that been done?

A. The last track was put in in 1907 and 1908.

Q. Now, what effect would it have upon these yard tracks and the ability of the Cincinnati Southern Railway or its lessee, the Cincinnati, New Orleans and Texas Pacific Railway Company to use those tracks in case this grant of October 8th, 1879, made by the State of Georgia, to the Trustees of the Cincinnati Southern Railway, were annulled?

A. And t*y*e use by them of that strip entirely discontinued, it would present a *cert* awkward situation at this time.

Q. Well, *is* what *would* respect would it be awkward?

A. The yard tracks have been designed to occupy the entire available property west of the two main tracks, which are now located on the property granted to the Trustees and in the course of time

several reinforced concrete viaducts have been built and the
348 spans of those viaducts have been located with reference to
the tracks as they now exist and as they are now operated.

Q. State whether or not there would be room *or not* on the right of way owned by the Cincinnati Southern Railway out side of the Western and Atlantic right of way, considering that right of way to be 66 feet wide, for a- adequate readjustment of these yards, in case this Georgia grant was annulled?

A. In so far as the capacity of the yards is concerned it would, of course, be less that it has now, and it has not enough now, and so far as the actual readjustment of the tracks is concerned, as I stated, it would be very awkward because of the construction of expensive viaducts which would be difficult to change and revise the location of streets to suit the revised system of tracks entirely outside of the 66 foot strip of the Western and Atlantic.

Q. Well, what I want to get at is, if I am right about it, whether or not the Cincinnati Southern possesses sufficient ground to accommodate a readjustment and rearrangement of its yard tracks if they had to be moved off of and had to clea*d* the right of way of the Western and Atlantic Railroad, considering that right of way to be sixty-six feet?

A. Not on this independent right of way.

Q. That is what I mean, I mean the independent right of way, and by independent right of way I mean right of way other that right of way obtained from the State of Georgia?

A. I should say not.

349 Q. Not what?

A. That they have not sufficient room to readjust the tracks and have facilities to handle the business.

Q. In what event?

A. In the event that the existing tracks on the 66 foot strip of the Western and Atlantic Railroad which are now used by the C. N. O. and T. P. are moved off from that strip.

Q. Now, in case the Cincinnati Southern Railway were required to remove its tracks from the right of way of the Western and Atlantic Railroad and to build their line from Boyce to Chattanooga entirely outside of the 66 foot strip, called for the sake of convenience, the Western and Atlantic right of way, how would the expense of doing that compare with what would have been the expense in 1879, and the years next succeeding it?

Mr. Wimbish: I note an objection to that question on the ground that if this be a terminal lease the Trustees of the Concinnati Southern must have had that in contemplation as well as the expense of any removal in the event the lease was revoked.

A. I would say that the expense at the present time would be very greatly in excess of what the expense of construction on that independent right of way would have been in the year 1879, and the years immediately following that year.

Q. And by "the years immediately following 1879" do you mean the time that would have been required to have built the line entirely outside of the Western and Atlantic 66 foot strip?

A. Yes, sir.

350 Q. I show you a photograph now that is marked "East End Viaduct Photograph No. 1, looking north or towards Boyce," and ask you to state what that shows?

A. This (referring to photograph) is a photograph of a portion of East End Avenue Viaduct where the same crosses over the tracks of the Cincinnati Southern Railway and the Western and Atlantic Railroad.

Q. Where was that photograph taken?

A. It was taken from a point——

Q. I say when?

A. Oh, when,—within the last thirty days.

Q. Will you state what rearrangement would have to be made of that viaduct in case the Cincinnati Southern was required to remove its tracks from the Western and Atlantic — of way; in other words in case that grant of October 8th, 1879, were annulled?

A. In order to provide the same facilities, that we now enjoy with reference to overhead and side clearance for trains at that viaduct, it would be necessary to reconstruct the west end of it due to the fact that at the present time the viaduct has a floor grade down, a grade down from its apex over out main tracks to the West and north.

Q. Could you get sufficient over head clearance under that viaduct as the viaduct is now, in order to relay the Cincinnati Southern Railway tracks in case they had to be moved beyond the Western and Atlantic 66 feet strip?

A. Not without reconstructing the viaduct.

Q. Would that be an expensive business,—I mean materially expensive?

A. It would be material and not only materially expensive
351 so far as the constructions costs are concerned, but it would
involve changes in grade of the street from which uncertain property damages would follow.

Q. Would it require the consent of the Public Authorities?

A. Well, my experience would lead me to say that it would.

Q. Now, I show you photograph No. 2, and ask you to state what that shows?

A. Photograph No. 2 is a photograph of the McCallie Avenue Viaduct taken from a point on the Chattanooga side of it and indicated the construction of the viaduct, the location of supports, which are designed to accommodate the present track arrangement at that point.

Q. Well, what readjustment of that viaduct would be necessary for the accommodation of the Cincinnati Southern Railway tracks in case its present right of way were taken from it?

A. It would be necessary to reconstruct the Western portion of it in order to get the necessary clearance and so place the supports that they would not interfere with the proper track arrangement.

Q. Would that necessitate any change in the grade of McCallie Avenue approaches to the viaduct?

A. It would necessitate a material change, which would be complicated by property interests along McCallie Avenue where the approach is now constructed.

Q. Well, that requires the same public sanction to the change that you spoke of in regard to the other viaduct?

A. I think it would.

352 Q. I present to you photograph No. 3, which has written on it "Over head crossing, Southern Railway near Citico Junction, looking north or toward Boyce", and ask you what that is?

A. This is a photograph of the bridge carrying the double main line track of the Southern Railway Company over the tracks of the Western and Atlantic and the Cincinnati Southern Railway.

Q. Well, what readjustment and rearrangement of that viaduct would be required?

A. The westerly support of this bridge is about on the westerly line of the 66 foot right of way of the Western and Atlantic. Therefore if the tracks of the Cincinnati Southern were moved off of that 66 foot strip, they would necessarily be placed entirely west of this west abut*t*ment and would require an entirely new bridge to carry the tracks of the Southern Railway. At the extreme westerly end of this bridge the Southern Railway tracks branch out or fan out from two into four, which would make the bridge construction still more expensive than the present bridge. In addition to that, the Southern Railway tracks are also on a steep gra*t*e there, down grade to the west, which further complicates the situation on account of the over hea*r* clearance.

Q. Now, I show you a photograph No. 4, Riverside drive bridge, near Citico Junction, looking north or towards Boyce, and ask you what that shows?

A. Photograph No. 4, shows a view of the recently constructed reinforced concrete viaduct which carries what is known as the Riverside Drive over and above the tracks of the Cincinnati Southern and the Western and Atlantic. This viaduct is designed in view
353 of the present arrangement and method of operation of tracks,
and to accommodate the suggested moving of the tracks off of the 66 foot strip of the Western and Atlantic, it would be necessary to reconstruct this structure.

Q. Mr. Daugherty, how long have the several structures that are shown in these photographs been in the locations that they *occ*-py now?

A. The East End Avenue viaduct, shown in photograph No. 1, *had* been in service now some three or four years. The McCallie Avenue viaduct, shown in photograph No. 2 some five or six years. The present overhead bridge carrying the two main tracks of the Southern Railway Company over the tracks of the Cincinnati Southern Railway and the Western and Atlantic Railroad, shown in photograph No. 3, was constructed to replace a former single track bridge some five or six years ago, the original bridge which spanned only the Western and Atlantic track, having been in place there before the original construction of the Cincinnati Southern tracks.

Q. It was then the East Tennessee, Virgina and Georgia, was it?

A. I believe so. The bridge shown in photograph No. 4, being the structure carrying the Riverside Drive over the tracks of the Cincinnati Southern and the Western and Atlantic, was built some two or three years ago.

Q. Mr. Daugherty, state how the cost of those viaducts was apportioned between the two railroads, the Cincinnati Southern and
the Western and Atlantic Railroad and the Cincinnati, New
354 Orleans and Texas Pacific Railway Company and the public,
if it was so apportioned?

Mr. Wimbish: You mean the Western and Atlantic Railroad lessee, do you not?

Mr. Colston: Well, he will tell that.

A. The negotiations between the Cincinnati, New Orleans and Texas Pacific Railway Company, the Nashville, Chattanooga and St. Louis Railway Company, lessee of the Western and Atlantic Railroad and the City of Chattanooga, contemplated that the City of Chattanooga would bear the expense of the paving on these structures and their approaches and that the Cincinnati, New Orleans and Texas Pacific Railway Company and the Nashville, Chattanooga and St. Louis Railway Company would divide the balance of the cost, out side of some minor costs due to claims of owners of property abutting on the approaches, between them in the ration of the width of their respective rights of way measured from *from* the median line, the middle line between the main track of the Western and Atlantic and next adjoining track of the Cincinnati Southern.

Q. Well, that, so far as the Nashville, Chattanooga and St. Louis Railway Company, as lessee of the Western and Atlantic Railroad, what width of right of way did that make them carry?

A. Forty feet.

Q. And all west of that forty feet was born- by the Cincinnati, New Orleans and Texas Pacific Railway Company was it?

A. Well, substantially. What I mean by that is that the total expense that was agreed to be born- by the two roads was divided in
the proportion of the width of the right of way of the respec-
355 tive companies, measuring from this line midway between
the two main tracks of their respective companies.

Q. That is the line midway between the track of the Western and Atlantic Railroad and the track of the Cincinnati Southern nearest to the track of the Western and Atlantic Railroad, is that?

A. That is it.

Q. Can you state approximately what the cost of these several viaducts was?

A. No, I do not carry that, I haven't looked it up. I do not carry it in my mind, the work was naturally in another department, so I was not familiar with the bills, and I don't recall—it was a large sum of money.

Q. What do you say as to there being ample room on the west side of the Western and Atlantic Railroad, as that road is now located, for another main line railroad from Boyce to Chattanooga?

A. You mean on the west side?

Q. On the East side?

A. I say there is ample room.

Q. Mr. Daugherty, what do you say about the effect on the embankment of the Cincinnati Southern Railway, from Boyce to Chattanooga, of flood waters that come up on the embankment and not reach to the top of the embankment?

A. I consider them objectionable from a maintenance standpoint, something that is to be avoided if practicable. The presence of water around a railroad embankment is, according to my experience, objectionable.

356 Q. Well, why is it objectionable according to your experience?

A. It is objectionable because of the expense that is incurred to restore conditions that are interfered with by the water. I mean that the water has a tendency to wash away some of the material of the embankment, which necessarily must be replaced, causing an expense. Moreover *on* one can tell in advance what the effect of water standing against any embankment is going to be, and our experience is that in many cases where we had no reason to suspect that the presence of water would do any damage, we have found that damage did occur without previous warning to such extent as would enable us to forestall the damage and keep the railroad in proper condition. Some time it causes accident, at other times, it may not cause accident, but the fact seems to be that we cannot tell with certainty what the effect is going to be if water stands against the slope of an embankment.

Q. What is your opinion as to whether or not the widening of the Western and Atlantic Railroad road bed from Boyce Station to Chattanooga that took place by reason of the construction of the Cincinnati Southern Railway, in the place where it was constructed, was a benefit to the Western and Atlantic road bed?

A. My opinion would be that it was a benefit.

Q. Were you present or did you have knowledge of the flood of 1917 at Chattanooga, that came up against any embankment from Boyce to Chattanooga?

A. Well, I was not in Chattanooga at the time of the crest of the flood but shortly afterwards. I observed some traces of the flood, and some sloughing off of embankments in this vicinity.

357 Q. Well, did you have any experience as to the giving away of embankments of the Cincinnati Southern north of the Tennessee River bridge and north of Boyce as a cons*u*quence of that 1917 flood?

A. Yes sir, I observed the action of the water—the giving away of a certain embankment which I attributed to the effect of the water which had bee*o*n thrown against this embankment by the rise of the Tennessee River and had later receded.

Q. Well, was there any other reason or cause to assign for it than that?

A. I could not assign any other cause than the effect of the water.

Q. Do you know whether a train went off of the embankment there in consequence of that subsidence?

A. Yes, this, that is I did not see it go off, but I saw the train, or part of it before it had been picked up.

Q. What had happened to the train?

A. The engine had—the engine and two or three cars had gone down the bank off the track.

Q. Did the track go too?

A. The track went too, the track with the engine and cars on it simply slip- down and the cars and engine toppled over.

Q. What sort of an embankment was that prior to that occur-ance, prior to the water getting upon it?

A. So far as I had ever been able to observe it was a normal embankment.

Q. Do you know whether it was an old embankment or a new one?

A. It was the original embankment.

Q. How old was that, *of* you know, in 1917?

A. Something over thirty-five years.

358 Q. What material was that embankment made of?

A. Clay.

Q. How far was that from Boyce Station?

A. I think about two miles.

Mr. Colston: You can examine.

Cross-examination.

By Mr. Wimbish:

Q. Mr. Daugherty, this embankment on the North side of the Tennessee River, which you have just spoken of as having been undermined and subsided, had it ever, prior to that time, shown any weakness?

A. Not so far as I could ascertain from our maintenance of ways force that had been familiar with it to a much greater extent than I had been. I had never observed myself any tendency to give way to that particular point, and inquiry from the track men, who had been familiar with it for a number of years, did not disclose anything of that kind.

Q. Was that embankment injuriously affected by the flood of 1886?

A. That I do not know personally, but would infer from my inspection of it from time to time since 1907, that there had not been any visible tendency to slide since that time.

Q. Well, in 1886 the waters were higher, the flood was greater *that* in 1917, wasn't it?

A. Yes, sir.

Q. And the embankment was a new embankment?

A. Yes, sir.

Q. And yet, so far as you know, that flood had no effect on that embankment?

A. No.

Q. Now, it has been testified here this afternoon and shown in evidence that in almost every year there has been high water in the Tennessee River, not flood stage, but high water,—do 359 you know how high the water must be in the Tennessee River to reach this embankment?

Mr. Colston: Which embankment?
Mr. Wimbish: The one he has spoken of that slided.

A. My judgment would be that it would be in the neighborhood of the stage of the river corresponding to about forty feet on the gauge.

Q. In order to reach the embankment at all?

A. In order to reach the embankment at all, the foot of it.

Q. How high was the embankment?

A. Oh, something like twenty to twenty-five feet.

Q. Let me see if I understand you. The first, the bottom of the embankment is about forty feet above the normal stage of the Tennessee River?

A. Yes sir.

Q. If the embankment had withstood former stages of the river exceeding forty feet, and I believe there were several besides the flood of 1886, must there not have been some neglect or some oversight or some concealed weakness in that embankment that caused it to give way in the flood of 1917?

A. I don't think the giving away of the embankment in 1917 fairly justifies the conclusion that it had been neglected in any way. To my mind it goes to show that an embankment against which the water stands will act in a way which cannot be predicted.

Q. Now you had no other embankment in this vicinity that was seriously damaged and gave way or slipped in the flood of 1917, did you?

A. Except the embankment north of Hixon, which has been referred to in this testimony.

360 Q. I am speaking now of this embankment you have referred to and on to Boyce—from Boyce into Chattanooga?

A. No, there was no serious trouble this side that point.

Q. But yet the Tennessee River reaches the embankment of the Cincinnati Southern and the Western and Atlantic on this side of the Tennessee River, before *they do* the embankment that you referred to and that gave away?

A. That is true.

Q. Then there must have been, in all these years since that road was built, not only the flood of 1886 and the subsequent years, but more frequent occasions of more water upon this embankment on this side of the river than on the embankment to which you refer?

A. That is true.

Q. Must there not be some essential difference, whatever it may have been whether of material or character of construction, or location or what not, must not there have been some essential difference in that embankment that caused the give-way in 1917, when these other embankments were not seriously affected?

A. Not necessarily. My view is that the same thing might happen with any of the embankments on this side of Boyce and between Boyce and Chattanooga, at a time that would be beyond a*b*ybody's power to say when it is going to happen and how serious it will be, but we do know that when the water stands up against the slope of an embankment, and for a greater or less period of time, and then recedes, my experience has been that very often this subsidence and slips and slides occur during that period.

Q. Yes, precisely, I think I understand that, and my point
361 is this that here you have an embankment forty feet above
the normal stage of the river, whereas your embankment from Boyce to Chattanooga at some places is only sixteen feet above the normal level of the river, in the thirty-five years the high water has come up against the embankment of your road south of the river many more times than it has on this embankment forty feet higher, so that if you were intending to illustrate the effect of standing water on an embankment, is it not a fact that there is more standing water and more frequently standing water on the embankment south of the river than of the embankment to which you refer, is there any other conclusion?

A. That is all true, but the fact still remains that we have these slides and slips come where we least expect them.

Q. Are you familiar with the Western and Atlantic road bed beyond Boyce, in the direction of Atlanta?

A. No.

Q. Do you know whether there has been any damage to that from high water in thirty-five years?

A. No, I do not.

Q. At what point in this embankment did this washout occur, at the base of the slide or the top?

A. The bottom of it seemed to push out away from the track and the top settled down, giving a list or inclination to the track in that direction (indicating), and then when the load came on and there was no support for the east rail, you might say, and of course that tipped the train over.

Q. What is the average width, or I will say the minimum width
that railroads now desire to secure for the operation of a
362 trunk line,—when I say trunk line I mean a main line?
A. Twenty feet for what we call the top of the embankment.

Q. I mean the width of the right of way, what is considered a convenient minimum width of the right of way, or a convenient, usual width.

A. The usual width is probably 100 feet, 50 feet either side of the center line of the track.

Q. No railroad having the traffic of your road and its expectations, or that of the N. C. and St. L., would desire a right of way of less than one hundred feet, if they could obtain it, would they?

A. Well, of course that all depends on the location and surrounding conditions.

Q. Of course, I am not speaking of going through——

A. I am speaking generally a hundred feet is a very common width of right of way.

Q. I am speaking now of rights of way, not in large cities, of course but between rights of way such as this we are referring to, is it not desirable and do not all of the roads now who can obtain it, get two hundred feet of right of way through the country?

A. No, I think there is a limit to the economical width of right of way. Where it is not required for embankment or cuts, or telegraph lines or signal system or anything of that kind, it is an additional burden to have it too wide, because it has to be mowed and cleaned, and more or less expense attaches to it.

363 Q. Do you know the width of right of way that the laws of the State of Tennessee permit a railroad to acquire and authorize it to exercise the power of condemnation in order to acquire it?

A. No, I don't believe that I could answer that.

Q. Do you know whether it is one hundred feet or two hundred feet more or less?

A. In Tennessee?

Q. Yes?

A. No, I don't.

Q. What is the width of the right of way of the Cincinnati Southern speaking generally?

A. One hundred feet.

Q. And that right of way was acquired prior to the enactment of this Georgia act of 1879?

A. Yes, sir.

Q. So that at the time the Cincinnati Southern Railway, or the Trustees evidently admitted that one hundred feet was the proper width of a right of way. Are you Chief Engineer of Maintenance and Construction of all of the lines of the Southern Railway System, Lines West?

A. Of maintenance, but not of construction.

Q. You are chief engineer of all their Lines West?

A. All the Lines West.

Q. Including the C. N. O. and T. P.?

A. Including the C. N. O. and T. P.

Q. Now, referring to this strip on the east side of the Western and Atlantic Railroad right of way in and near the City of Chattanooga, occupied by the Cincinnati Southern, is the right to occupy 364 this strip claimed by the Cincinnati, New Orleans and Texas Pacific Railway Company or is it claimed by the Trustees of the Cincinnati Southern Railway.

Mr. Colston: We object to that question as incompetent and not a question that it is right to have this witness answer.

A. I found when I took charge of the maintenance of tracks of the *of the* Cincinnati, New Orleans and Texas Pacific Railway Company, and still find, this strip of land occupied by tracks that belong to the, or at least are operated by the Cincinnati, New Orleans and Texas Pacific Railway Company. That is evident to me that the tracks,—that those tracks are tracks of the Cincinnati, New Orleans and Texas Pacific Railway Company. What claim the Cincinnati Southern or the Trustees thereof, either or both of them make with reference to that particular strip of land, I am not informed.

Q. You, then, do not know whether the Trustees of the Cincinnati Southern claim the right to occupy that property and the Cincinnati, New Orleans and Texas Pacific occupies that as lessee of the Trustees of the Cincinnati Southern, or the C. N. O. and T. P. claims an independent right?

A. No, I am not informed on that point. I just found the tracks there.

Q. Then you do not know if this possession of this property may have been during a series of years, based on a claim of right?

A. Well, I know that it has been in the possession of the Cincinnati, New Orleans and Texas Pacific since my first acquaintance with it.

Q. You do not know whether they claim an independent
right to use it aside from being lessee of the Cincinnati
365 Southern?

A. I have not been informed on that point.

Q. Do you know by what authority the Cincinnati, New Orleans and Texas Pacific Railway Company occupies that right of way to which I have referred?

A. No, I do not.

Q. Is the right claimed either in behalf of the Trustees of the Cincinnati Southern or in behalf of the Cincinnati, New Orleans and Texas Pacific Railway Compay, that it passed under this act of the State of Georgia, of October 8th, 1879, to which we have referred?

A. I don't know.

Q. Was any authority claimed to have been granted to either the Trustees of the Cincinnati Southern or the Cincinnati, New Orleans and Texas Pacific Railway Company to occupy this strip, by the lessee of the Western and Atlantic Railroad?

A. I do not know.

Q. Did I understand you to say that this east side of the right of way was necessary to be used in order to reach your terminals, or certain of your terminals, perhaps?

A. I said it was used in connection with reaching those terminals.

Q. Is it reasonably necessary for that purpose?

A. I think so.

Q. Well, if that be true, do you know why the Trustees of the Cincinnati Southern did not ask the State of Georgia for authority to occupy that portion of this right of way?

Mr. Colston: We object to the question as incompetent and
366 as calling on this witness——

A. I can only surmise as to the reason why the Trustees did not make any such application.

Q. Of course I do not want pure surmise, but any deductions from facts I would be glad for you to state?

Mr. Colston: We object to the witness making any statements of that sort because it is a subject with which he is not familiar.

Mr. Wimbish: I do not think he has answered as to what his knowledge of it is.

A. I can only judge from the situation as I see it now, that they probably overlooked it.

Mr. Colston: We object to the answer.

Q. Was this crossing of the Western and Atlantic Railroad from the west to the east side and the building of the tracks on the east side of the Western and Atlantic right of way done continuously, I mean by that at the same time, when you began entrance for the Cincinnati Southern into the City of Chattanooga over the right of way of the Western and Atlantic, was that entrance begun by the use of the west side of the right of way, authority for which is claimed under this act, and also the use on the east side, for which the act, apparently, grants no authority; in other words was that the way they came in originally?

A. The construction proceeded right along from the west side over on to the east side and to these terminals as a continuous proposition, yes.

Q. And was that before the Cincinnati, New Orleans and Texas Pacific Railway Company leased the Cincinnati Southern?

367 A. Yes sir.

Q. So that the Cincinnati Southern did go on this property before it was leased?

A. Yes, sir.

Q. Before the road was leased to the Cincinnati, New Orleans and Texas Pacific?

A. Yes, sir.

Q. Well, this occupation of this east side of the right of way is no protection to the Western and Atlantic Railroad against floods in the Tennessee River, is it?

A. No.

Q. Do you know of any consideration that was offered and given to the State of Georgia for the right to use that part of this right of way?

A. I do not know whether there was any consideration given or not.

Q. Your photograph No. 1, shows the East End Avenue viaduct, does it not?

A. Yes, sir.

Q. Well, at the east end what is the clearance under that viaduct, the Western and Atlantic Railroad has two tracks, has it not?

A. Yes, sir—under the East End Avenue?

Q. Yes?

A. Yes, sir.

Q. Now, adjoining them to the west the Cincinnati Southern Railway has three tracks under that viaduct.

A. Under the next span, yes sir.

Q. And part of the ground under the span was the right of way of the Western and Atlantic Railroad that is now claimed by the Cincinnati Southern, was it not?

368 A. Yes, sir.

Q. Now the third span has a space of 25 feet between supports, hasn't it?

A. I don't recall the exact dimensions, but I think it is in that neighborhood.

Q. Well, about that, I am not getting it down to inches?

A. About 25 feet.

Q. That is over the right of way of the Cincinnati Southern Railway?

A. Over part of it.

Q. Isn't that altogether over that right of way?

A. Yes, that span is altogether over part of the right of way.

Q. Now, there is only one track of the Cincinnati Southern through there, is there not room there for another track of the Cincinnati Southern?

A. Yes, but it would not have the necessary overhead clearance.

Q. It would not?

A. No.

Q. What is the clearance?

A. 22 feet, but that clearance diminishes as you go west.

Q. Now, I am speaking of this third span, would there not be room there for another track, with sufficient clearance?

A. Not with sufficient clearance, not for a main line track, no.

Q. Then there is thirty additional feet under the next span, would the clearance there be sufficient for tracks?

369 A. No, but the overhead clearance, the side clearance would be sufficient but the overhead clearance would not be sufficient.

Q. Do you know what that clearance is, vertically?

A. Well, it gradually diminishes as you go west to the rate of about five feet,—between five and six feet in a hundred, so that if you go twenty-five feet the vertical clearance diminishes about a foot and a half.

Q. Do you know what it is at the beginning at the east side of the last span or the western span?

A. No, except I know it is less than 22 feet.

Q. Do you know how the vertical clearance under this last span to which I have referred, under the East End viaduct, compares with the vertical clearance under the Southern Railway overhead bridge over the tracks of the Cincinnati Southern Railway, is it greater or less, and if less how much less?

A. I could not tell exactly without making some measurements which I have not made, but my judgment is that it is probably a little less, about a foot.

Q. About a foot less?

A. Yes, sir.

Q. Well, do you think that some foot marks the line of demarkation between which you can have sufficient clearance or you cannot have it?

A. Well, for main tracks I regard 22 feet as the desirable clearance.

Q. I know, but you could have the necessary clearance under the span of East End Avenue?

A. Well, that of course, depends upon the interpretation
370 you got of the *work* "necessary."

Q. Well, you have practically the same clearance that you have under the Southern Railway overhead?

A. Well, I do*n* not regard the clearance of the Southern Railway overhead bridge as a criterion.

Q. Now, take McCallie Avenue viaduct. The first span there to the east has one track of the Western and Atlantic Railroad, has it not?

A. The span over the Western and Atlantic Railroad has only one track in it, with room for at least one more, probably two.

Q. Well, what is the width of that span?

A. Substantially 32 feet in the clear.

Q. Now, the next span has that same width, 32 feet?

A. About.

Q. The Cincinnati Southern has three tracks?

A. Yes.

Q. In there, haven't they?

A. Yes.

Q. What is the next span in width, 35 feet?

A. I don't know, I don't recall. My recollection is that that next is on askew, and that the width there is not uniform.

Q. Would you say it is approximately 35 feet?

A. I think it is a little less.

Q. Well, say 30 feet?

A. I think about thirty feet on an average. I say it is probably wider on the south side than it is on the north side, on a kind of askew of one of the row of supports.

Q. Is the vertical clearance overhead the same through
371 that span as it is through the span we have just referred to, east of that?

A. No, it is gradually getting less as you go west.

Q. Is that clearance 22 feet?

A. No, it is less than 22 feet.

Q. Are you sure of that, have you measured it or have you critically examined it?

A. No, I am speaking of my recollection of the construction, of the plans, not from actual measurement, and from the fact that, as I recall it, the grade breaks at that support, west of the Cincinnati Southern main tracks, and from that point west, the grade goes down.

Q. Well now that span is altogether over a portion of the right of way of the Cincinnati Southern isn't it?

A. Yes sir.

Q. There is room there for two or three tracks more?

A. Yes, sir.

Q. Then take the next span—there are no tracks in that space now?

A. Freight tracks.

Q. But freight tracks?

A. Yes, sir.

Q. Under this third space, you think there are tracks in there now?

A. I will modify that, I am not sure there are any tracks at all under it.

Q. Under this next space?

A. Yes, the next span.

372 Q. You have three tracks under that, have you not?

A. Yes, sir.

Q. And the next adjoining space you have two tracks haven't you?

A. Yes.

Q. So you have now, on your right of — seven tracks, with room for three more?

A. The tracks—that is a little misleading. Of course tracks might be placed there, but tracks are of no use unless you can use them.

Q. Why place them there without you can use them?

A. Our only reason why there are no tracks in that space is that we could not use them if we had them there on account of the way the yard is arranged.

Q. Well, a rearrangement of the yard would permit the use of that space with tracks, would it not?

A. That is a question that depends altogether on whether you could arrange the yard so it would be practical to use that space for tracks. That is a very involved matter, the proper arrangement of tracks to facilitate operations.

Q. Well, you have seven tracks already in there?

A. Undoubtedly.

Q. Now, the Western and Atlantic has only one with room for at least one more?

A. Yes.

Q. Now, we will come to the Southern Railway overhead bridge, the Western and Atlantic has only one track under there, I think?

A. Yes, sir.

373 Q. The Cincinnati Southern has two?

A. There is room for another track for the Western and Atlantic.

Q. Is there room for any tracks for the Cincinnati Southern?

A. No, there is only room for four tracks under that span.

Q. Well, now, the present overhead structure, you stated, I believe, was built within the last four or five years?

A. Well, this recent structure; I didn't have anything to do with the building of it, and my recollection is only in so far as it affected *out* road, but it was somewhere in the neighborhood of four or five years ago.

Q. Do you own right of way west of the western abutment of that overhead; in other words, if there was additional clearance in there, do you own right of way you could go in?

A. Yes, with the exception of the original right of way of the East

Tennessee, Virginia and Georgia which was a separate line and was there before the purchases the Trustees made. Therefore what the Trustees acquired came up to the line of the East Tennessee, Virginia and Georgia on either side.

Q. Yes, I think I understand what you mean by that. What authority did the Southern Railway get for building that overhead, did the Cincinnati Southern consent to it?

A. I don't know about that.

Q. They could not go over there and take your property without your consenting to it?

374 A. Well, so far as I know the Cincinnati Southern or the Cincinnati, New Orleans and Texas Pacific did not object to it.

Q. So it was put there and put there in recent years with the acquie*n*cence of the Cincinnati, New Orleans and Texas Pacific?

A. Yes, sir.

Q. What authority did you have to build over the right of way of the Western and Atlantic Railroad?

A. That I do not know I didn't build, or we didn't build that bridge.

Q. If it had no authority to build over the Western and Atlantic Railroad and if the Cincinnati Southern acquiesced in the building of this overhead over its right of way, do you think it would be unreasonable or incur a hardship on the Southern Railway Company to make them reconstruct the overhead bridge to meet your needs?

Mr. Colston: We object to the question as incompetent, irrelevant and immaterial.

A. I think that would be only a matter of opinion, and my opinion,——

Q. Well, I have great respect for your opinion.

Mr. Colston: We object to calling on the witness for an opinion as to what would be reasonable.

A. (No further answer.)

Q. Now we come to the Riverside Drive,—Now, take the western end of the Riverside Drive Viaduct, the western span, that has a width of what, about 23 feet?

A. You mean the span next adjoining the span over the Cincinnati Southern and the W. and A. tracks?

375 Q. Yes, in the center span I understand the Cincinnati Southern has two tracks and the Western and Atlantic has one?

A. Yes, with room for one.

Q. Would there be room for two more in 22 feet?

A. Hardly. It takes 13 feet for a track—Well *it* takes really 15 feet for one track and twenty-eight feet for two tracks.

Q. So you think there would be room for only one more track?

A. Yes.

Q. And that would give the Cincinnati Southern three tracks under that, if you built one additional track.

Mr. Wim*n*ish: That is all.

Redirect examination.

By Mr. Colston:

Q. Whatever possession the Cincinnati, New Orleans and Texas Pacific has to any property of the Cincinnati Southern Railway is by virtue of a lease, is it not, from the Cincinnati Southern Railway Trustees to the C. N. O. and T. P. Railway Company?

A. Yes, sir.

Q. It does not claim to own anything except under the Cincinnati Southern Railway, except by virtue of that lease, does it?

A. Not so far as I am advised.

Q. Now I am going to ask you a little bit—these viaduct structures, you said you did not know what any of these structures cost, or that, at least, you do not know now, but are they costly structures?

A. I would think they represent at least a hundred thousand dollars, on an average, apiece.

376 Q. Well, there are how many of them, four?

A. Three.

Q. Three and the overhead bridge?

A. Yes, sir.

Q. Now, take this East End Viaduct, is there overhead clearance sufficient to accommodate the same number of tracks for the Cincinnati Southern Railway in case this Georgia grant was taken away from the Trustees of the Cincinnati Southern Railway Company?

A. There is not.

Q. How is it as to McCallie Avenue viaduct in case this grant should be taken away from the Cincinnati Southern Railway Trustees, would there be overhead clearance under that viaduct to accommodate the same tracks that the *the* Cincinnati Southern Railway has now under it?

A. There would not.

Q. Take this overhead bridge of the Southern Railway Company, if you were to take away this Georgia grant could the Cincinnati Southern Railway get the same trackage space under that bridge?

A. No.

Q. How is it with regard to the Riverside Drive Viaduct, which is No. 4, is there overhead clearance there for the same trackage in case this grant should be taken away from the Trustees of the Cincinnati Southern Railway?

A. No.

Q. Well, this overhead bridge of the Southern Railway Company, not the Cincinnati Southern, but of the Southern Railway Company, that is shown on photograph No. 3 is that a replacement of a bridge that was there before, or is this bridge the first bridge that was there?

377 Mr. Wimbish: I think he testified as to that, that the other was a single track over head bridge, and about four or five years ago it was double tracked.

A. Yes, the recent structure replaced the former structure.

Q. How long had that former structure been there, do you know?
A. I do not know.

Mr. Colston: I now offer in evidence these photographs which have been referred to, as Defendants' Exhibits Nos. 3, 4, 5, and 6.

Admitted in evidence and marked Defendants' Exhibits 3, 4, 5, and 6, accordingly.

Mr. Colston: I want to offer in evidence a certified copy of the Act of the State of Tennessee, incorporating the Nashville & Chattanooga Railroad Company.
Mr. Wimbish: No objection.

Admitted in evidence and marked Defendants' Exhibit No. 7.

Mr. Colston: I also offer in evidence this bill for ten dollars that we paid the Secretary of the State of Tennessee, let that go with it.
Mr. Wimbish: I object to that because we have stipulated that these may be used with out requiring them to be certified, and if you care to go to the expense of certified copies I do not think it should be included in the costs in the case.
Mr. Colston: I don't know about that, I had forgotten about that. Let it go in anyway.

Admitted in evidence and marked Defendants' Exhibit No. 8.

378 Mr. Colston: I offer in evidence certified copy of an Act of the State of Tennessee incorporating the Hiwassee Railroad Company.

Admitted in evidence and marked Defendants' Exhibit No. 9.

Mr. Colston: I also offer in evidence an act of the General Assembly of the State of Georgia, entitled "An Act to provide for the lease of the Western and Atlantic Railroad, to define the rights, powers, liabilities, and duty to the lessee, and for other purposes, therewith connected." Approved November 12th, 1889, contained in Acts and Resolutions of the General Assembly of the State of Georgia, 1888-9, Volume 2, page 392, and I suppose we can stipulate that we can use that from the book?
Mr. Wimbish: We already have that stipulation, as I understand it, as to all of these acts.
Mr. Colston: But these other acts are not in the record.
Also, I offer an act of the General Assembly of the State of Georgia entitled "An Act to provide for the leasing or other disposition of the Western and Atlantic Railroad and its properties; for the creation of a Commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the cost of the work required, and for other purposes." Approved November 30, 1915, shown in Act and Resolutions of the General Assembly of the State of Georgia, at extra session convened by the proclamation of the Governor of February 3d, 1915, commencing at page 119, of the bound volume of those acts.

You say that the stipulation could cover the use of these acts from the bound volumes?

379 Mr. Wimbish: The stipulation is that we can use any of these acts, without any certification, from the original bound record. But I want to note this on the record that by virtue of the stipulation between the parties, counsel for the complainant will ask that no part of the cost or expenses of procuring these acts or printing them, or otherwise incurred by reason of them, shall be charged as costs in the case.

Mr. Colston: We also offer in evidence as Defendants' Exhibit No. 10 the lease of the Western and Atlantic Railroad to the Nashville, Chattanooga and St. Louis Railway dated July 19th, 1890.

Admitted in evidence and marked Defendants' Exhibit No. 10.

Mr. Colston: Also lease from the State of Georgia to the Nashville, Chattanooga and St. Louis Railway, dated May 11th, 1917.

Received in evidence and marked Defendants' Exhibit No. 11.

Mr. Colston: I offer in evidence the determinable license from the Trustees of the Cincinnati Southern Railway to the Cincinnati Railroad Company executed May 19th, 1879, and extension of the same of date February 10th, 1880.

Mr. Wimbish: I object to that because it is not responsive to any issue in the case. The authority of the Cincinnati Southern Railway to build this road is not only not disputed but is especially alleged in the Bill, and no question of the right of the Cincinnati, New Orleans and Texas Pacific to the use and enjoyment of all the rights that it acquired under the lease of the Cincinnati Southern
380 is raised, on the contrary it is alleged and admitted.

Mr. Colston: The defendant states that the lease in question is an entirely different document from that referred to by Counsel for complainant.

Mr. Wimbish: I object to it further on the ground of being immaterial and irrelevant.

Received in evidence and marked defendants' Exhibit No. 12.

Mr. Colston: I offer in evidence the contract between the Cincinnati Railroad Company and the Western and Atlantic Railroad Company, for the use of the track of the Western and Atlantic Railroad Company from Boyce Station to Chattanooga, executed September 6th, 1879, effective for two years from December 1st, 1879.

Received in evidence and marked Defendants' exhibit No. 13.

Mr. Colston: That is all I have to offer at this sitting.

Thereupon the taking of testimony was adjourned to a time and place to be agreed upon between counsel for the reqpective parties.

381 In the Supreme Court of the United States, October Term, 1917.

Original, No. 23.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans and Texas Pacific Railway Company.

Pursuant to agreement between counsel a hearing was called for the taking of further testimony on behalf of the defendants in the above stated cause at the Room of the Directors of the Cincinnati, New Orleans and Texas Pacific Railway Company, Ingalls Building, Cincinnati, Ohio, on April 18th, 1918, at 11 o'clock A. M.

The following appearances are noted.

William A. Wimbish, Esquire, of Atlanta, Ga., for the Complainant.

Edward Colston, Esquire, W. T. Porter, Esquire, and John W. Peck, Esquire, all of Cincinnati, Ohio, for the defendants.

30 copies each of defendants' exhibits Nos. 2, 3, 4, 5, and 6 were furnished the Examiner to be transmitted to the Court with the record of evidence.

382 G. P. BILES, a witness called on behalf of the defendants having been first duly sworn by the Examiner, testifies as follows:

Direct examination.

By Mr. Colston:

Q. Please state your name and place of residence?

A. George P. Biles, Cincinnati, Ohio.

Q. In what year did you become assistant General Freight Agent at Cincinnati for the Cincinnati, New Orleans and Texas Pacific Railway Company, one of the defendants in this case?

A. In 1888.

Q. Now, ever since that time have you continued to be connected, in the same or in a higher capacity with the freight traffic Department of the Cincinnati, New Orleans, and Texas Pacific?

A. Yes, sir.

Q. Are you familiar with the exchange of traffic in Chattanooga between the Western and Atlantic Railroad and the Cincinnati, New Orleans and Texas Pacific Railway Company regarding freight going from Atlanta and points beyond to Cincinnati and points beyond and the practice at Chattanooga between those two roads regarding exchange of freight from Cincinnati and points beyond to Atlanta and points beyond?

A. Well, I will say yes, there, yes, sir.

Q. Calling your attention to the time prior to the lease of the Western and Atlantic Railroad to the Nashville Chattanooga and St. Louis Railway Company, the leasing occuring in 1890, did the Western and Atlantic deliver to the Cincinnati, New Orleans and Texas Pacific Railway Company at Chattanooga, all of its north bound freight to Cincinnati and points beyond, or did it deliver such freight or a considerable part of it, at Chattanooga, to a connection 383 other than the Cincinnati, New Orleans and Texas Pacific, and if so what was such other connection?

A. The Western and Atlantic had two connections at Chattanooga for the north, namely the Cincinnati, New Orleans and Texas Pacific and the Nashville, Chattanooga and St. Louis, and Western and Atlantic did not deliver to the Cincinnati, New Orleans and Texas Pacific all of its business for Cincinnati proper, and points routed through Cincinnati, but patronized the Nashville, Chattanooga and St. Louis Railroad, by way of Nashville, through Louisville.

Q. Was that the case even before the lease of 1890?

A. That was prior to 1890.

Q. Now, then after the Western and Atlantic Railroad was leased to the Nashville, Chattanooga and St. Louis, what was the practice of the Western and Atlantic or its lessee, prior to 1906, regarding the forwarding beyond Chattanooga of Atlanta and Cincinnati freight?

A. The Western and Atlantic and the Nashville Chattanooga and St. Louis formed a through route from Atlanta to Nashville, and in connection with the Louisville and Nashville Railroad at the latter point and the Western and Atlantic influenced practically all of its business in the northern territory over the Nashville route, leaving very little except that which was routes by the C. N. O. and T. P. to be delivered to that railroad at Chattanooga.

Q. Now, that applied to the time between 1890 after the lease of the Western and Atlantic Railroad to the Nashville, Chattanooga and St. Louis, and 1906, does it?

A. Yes, sir.

384 Q. Now during that period from, say, 1890, to 1906, what was the practice of the Cincinnati, New Orleans and Texas Pacific Railway Company in exchanging, at Chattanooga, freight from Cincinnati and points beyond destined to Atlanta and points beyond?

A. Does your question deal with from 1890 to 1900?

Q. No, my question applies from 1890, the time when the Western and Atlantic Railroad was leased to the Nashville, Chattanooga and St. Louis, to 1906, the time when the Louisville and Nashville built an independent through line from Atlanta to Cincinnati via Knoxville, not entering Chattanooga, that is the period this question is addressed to; what was the——

A. Well there are two periods of time there, one is from 1890 to 1900, it seems to me.

Q. Well go ahead and divide it as you like, if the answer requires?

A. Well, in any event, when the C. and N. leased the W. and A. Railroad, from that time until the time,—until 1906, we will say, that is the latter date being the date when the L. and N. Railroad built its line into Atlanta, the Western and Atlantic Railroad influenced practically all of its traffic from Atlanta and beyond to Cincinnati and territory north thereof, by way of Nashville and there was very little of it delivered to the C. N. O. and T. P. at Chattanooga, the tendency being at that time to turn practically all of its traffic, which was only natural, by way of Nashville in as much as its rails practically extended from Atlanta to Nashville.

Q. Now you spoke in your answer of the "N. and C." what
385 was the "N. and C.," what road did you refer to?

A. Well, the N. and C. I referred to the Nashville Chattanooga and St. Louis Railroad, it is usually referred to briefly or in abbreviated form *at* the "N. and C." in railroad parlance it is called "The N. and C." and the Nashville and Chattanooga Railroad.

Q. Now, in the case of railroads where there is a choice of equally good connections, what consideration acc*ur*ing to the railroads, in the usual railroad practice, dominates the selection of the connection that road will use for forwarding purposes.—I am speaking of unrouted freights?

A. Primarily business reciprocity.

Q. Explain what you mean?

A. A railroad connection, say, has two railroads to deal with and that particular connection can make better arrangements with one of these other roads about exchanging traffic, *is* will select that as its connection for its business.

Q. Well, now what do you mean by "Better arrangements," what does that signify?

A. In a business way, take for instance the C. N. O. and T. P. may have a connection at a certain point with two roads and may be able, we will say, to make a better business deal with one of those connections than with the other and it will, therefore, enter into an arrangement to exchange its traffic with that railroad because it will get some return business, and it would be foolish for one railroad to make an arrangement with another railroad unless it got something in return for what it gave it.

Q. That is what you mean by arrangement?

386 A. Yes, sir, business reciprocity.

Q. What do you say as to whether the East Tennessee, Virginia and Georgia from Chattanooga to Atlanta as it was called before the Southern Railway Company took it over in 1894, was as good a connection as the Western and Atlantic Railroad between Chattanooga and Atlanta?

A. Well, from a business standpoint it was considered a better connection than the Western and Atlantic, because the East Tennessee, Virginia and Georgia will and did turn its business to Cincinnati and beyond, coming from Atlanta and beyond, over to the C. N. O. and T. P. practically all of its unrouted traffic, which was not the case with the other railroad.

Q. The East Tennessee, Virginia and Georgia was a more patron *patron* to the Cincinnati, New Orleans and Texas Pacific *that* the other.

A. Yes sir, and therefore we were inclined to treat the E. T. V. and G. like they treated us.

Q. Was it or not the fact that the E. T. V. and G. was, during part of that time, interested in the C. N. O. and T. P. and interested in the way of routing freight that was not routed by the sender, the consignor or party at interest?

A. Only to the extent of a business way, purely a business transaction and nothing else which we had at that time.

Q. Well now, did the Louisville and Nashville Railroad Company in 1906, establish its own through line of railroad between Atlanta and Cincinnati, by way of Knoxville and not by way of Chattanooga?

A. The Louisville and Nashville never had a railroad by way of Chattanooga from Cincinnati to Atlanta.

387 Q. Did they establish a line from Atlanta to Cincinnati?

A. They did establish a line from Cincinnati to Atlanta by Knoxville.

Q. But not by way of Chattanooga?

A. Not by way of Chattanooga.

Q. After that line was opened by the Louisville and Nashville, what attitude did the Louisville and Nashville take toward continuing the former exchange arrangement with the Nashville, Chattanooga and St. Louis on freight business from Atlanta and points beyond to Cincinnati and points beyond and former exchange of freight from Cincinnati and points beyond destined to Atlanta and points beyond?

A. Prior to the opening of that road through Knoxville the Louisville and Nashville Railroad carried its traffic from Cincinnati and beyond to Atlanta and beyond by way of Nashville.

Q. And by the N. C. and St. L. to——

A. By the N. C. and St. L. to Chattanooga and over the Western and Atlantic into Atlanta. When their line was opened through Knoxville they immediately transferred their efforts from the Nashville route to the Knoxville route.

Q. Who do you mean by "they"?

A. The Louisville and Nashville people. In other words they set out to carry their freight over the Louisville and Nashville between Cincinnati and Atlanta and beyond by way of Knoxville, instead of via Nashville, as formerly. That brought about competition as between the Nashville, Chattanooga and St. Louis and the Louisville and Nashville Railway Companies. By the opening of this Knoxville line, the N. C. and St. L. was deprived of that particular 388 freight between Cincinnati and Atlanta by way of Nashville and the L. and N. handled it around by way of Knoxville. The result was that it then forces the Nashville, Chattanooga and St. Louis to handle its traffic in connection with the Cincinnati, New Orleans and Texas Pacific between Chattanooga and Cincinnati on this Atlanta and Cincinnati traffic and the N. and C. placed their solicitors in the field here in this territory, this Cincinnati territory, with the express purpose of securing traffic from this territory, the Cincinnati territory to Atlanta and beyond in connection with the

C. N. O. and T. P. for delivery to the Western and Atlantic Railroad at Chattanooga, and were very successful in that respect.

Q. Now after the Louisville and Nashville had opened and put in operation this line direct from Atlanta to Cincinnati by Knoxville and had taken the attitude towards the Nashville, Chattanooga and St. Louis that you have described, what was it necessary for the Western and Atlantic to do in order to get any freight north bound to Cincinnati and to points beyond Cincinnati reached through Cincinnati?

A. The only outlet that they had from Atlanta and territory south to Cincinnati and beyond was the C. N. O. and T. P.

Q. They had a good out let by sending over the C. N. O. and T. P.?

A. They had to do that. If the C. N. O. and T. P. had not been in existence they could not have handled business under such an arrangement, after the L. and N. had established that line.

Q. That is under the attitude they had taken?

A. Yes, sir.

389 Q. Considering the attitude which the Louisville and Nashville took after the opening of this via Knoxville route between Atlanta and Cincinnati, could the Western and Atlantic have gotten any haul at all, if there had not been *and* Cincinnati Southern Railway from Chattanooga north to Cincinnati?

A. No.

Q. They would have been out on all of that business?

A. They would have been forced to have retired from the business entirely.

Q. Now, there has been testimony taken in this case, on behalf of the State of Georgia on the subject of forwarding freight from Atlanta to Cincinnati, by the Western and Atlantic between Atlanta and Chattanooga and via Cincinnati, New Orleans and Texas Pacific from Chattanooga to Cincinnati and in solid train load lots of freight. Now, I have asked you to examine into that subject, have you done so?

A. Yes, sir.

Q. Well, now what did you find to be the fact in regard to that?

A. Well, I never heard of the exchange of traffic from the Western and Atlantic to the Cincinnati, New Orleans and Texas Pacific at Chattanooga in what might be termed solid train loads; which I understand to mean that a train would be made up in Atlanta and sent through to Cincinnati as one solid movement. In 1909 we did handle, in connection with the Western and Atlantic, some pine apples from Cuba destined to Cincinnati and other points north of Cincinnati, and particularly fast time was arranged for, due to competition, and those solid trains of pine appl*ies*, which came out of Florida from Cuba, were brought into Chattanooga over the 390 Western and Atlantic and transferred to the C. N. O. and T. P. as solid trains and sent right on to Cincinnati, and solid trains were delivered to the Big 4 Railroad here for Chicago. Now, that is about the only solid train movement that I can recall. As a general proposition such a movement does not take place. The exchange of traffic is usually by what is known as cuts of cars. That is various termini, for example *of* the Western and Atlantic would bring in loads to Chattanooga at various times during the day and night, and at specific intervals would turn over so many cars to the C. N. O. and T. P., all the way may be, from five to ten *of* fifteen cars, and the volume of the traffic would be made up of those cuts. That is the common practice all over the Country. If the testimony given refers to that kind of delivery I can understand it, but I can't understand it if it refers to what might be termed solid train loads, because I don't recall any such movements as those. I can appreciate this too, that in what might be termed the water-melon season—we used to handle years ago, a great many water-melons out of the State of Georgia and during the heavy period there may have been a few trains of water-melons made up in Atlanta and sent through to us at Chattanooga, or something that way, but when it comes to the general run of traffic deliveries, they are not made in that way, in what might be termed train load lots.

Q. I ask you to direct your attention to the subject as to the extent to which the Cincinnati, New Orleans and Texas Pacific Railway Company delivers freight at Chattanooga to the Western and Atlantic Railroad, I refer to freight coming from Cincinnati and from points beyond Cincinnati through Cincinnati and destined for Atlanta and points reached through Atlanta, and I also refer 391 to freight from Cincinnati and from beyond Cincinnati and from points on the line of the Cincinnati, New Orleans and Texas Pacific Railway Company destined to way points or local points on the Western and Atlantic. Have you done that?

A. Yes sir, I have done that.

Q. Please state what the fact is in regard to such freight movements?

A. So far as I have *I have* been able to determine in the short space of time I have had to look into this thing, I can't go into detail to show just what the movement has been, but the movement from and beyond Cincinnati to points on and beyond the Western and Atlantic Railroad is substantial, probably in the neighborhood of about twenty cars a day, eighteen to twenty cars a day. I have not been able to prepare a statement for any interval or period, but looking over the records for the last three months of last year, I find that the C. N. O. and T. P. had delivered to the W. and A. at Chattanooga an average of about eighteen to twenty cars a day destined to points on or beyond the W. and A.

Q. Is that unrouted or routed freight?

A. That is routed freight.

Q. Explain the difference between routed and unrouted freight?

A. Well, the difference is this merely: A car load may be sent from Dayton, Ohio, to Atlanta, Ga., and it is delivered to us here by the Big 4 Railroad, and the billing of that car does not show any specific route beyond our rails. We call that an unrouted car. And we undertake to send that on to its destination in accordance with our own ideas. Another car may move from Dayton to At-

392 lanta and it comes to us from the Big 4 and is routed specifically over the W. and A. Railroad or via the N. and C. That car then is billed and delivered to the W. and A. Railroad at Chattanooga. That is what is know- as a routed car. Now that routing may be designated by the initial line or it may be designated by the shipper or *designed* by the C*i*nsignee at Atlanta,—the consignee, the shipper or the initial line.

Q. This routing may be designated either by the consignee, the shipper or the initial carrier?

A. Yes sir.

Q. And does the carrier respect that routing?

A. All railroads respect routing—well I am talking now about prior to January 1, because the situation——

Q. You mean last January?

A. Yes, the railroad situation now is different from what it was then.

Q. In regard to unrouted freight for Atlanta and points beyond reached through Atlanta is the disposition made at Chattanooga by the Cincinnati, New Orleans and Texas Pacific, one purely of business, or is there any prejudice or hostility entering into it, against the Nashville, Chattanooga and St. Louis or the Western and Atlantic that enters into the question?

A. It is purely a business proposition with us.

Q. It is all, then, done in the way of railroading is it?

A. Yes, sir, it is the *un*us-al railroad practice all over the country.

Mr. Colston: You can examine him.

393 Cross-examination.

By Mr. Wimbish:

Q. Mr. Biles, you spoke of an interest that the East Tennessee, Virginia and Georgia had in the Cincinnati, New Orleans and Texas Pacific Railroad, what was the nature and extent of that?

A. Mr. Colston spoke of that.

Q. Well, what was the interest of the East Tennessee, Virginia and Georgia in the Cincinnati, New Orleans and Texas Pacific?

A. That emanated from Mr. Colston, he had better answer that.

Q. Mr. Colston is not on the stand, and I want to know what you know about it?

A. I can't go into details with respect to that.

Q. Well, what do you know about it?

A. That is really a question I can't answer.

Q. Give me the benefit of your best information, can't you?

A. The interest that Mr. Colston spoke of is something I do not know anything about.

Q. Do you know of any other interest except that he spoke about?

A. The only interest that existed between the E. T. V. and G. and the C. N. O. and T. P. that I know of was a business proposition pure and simple, that the E. T. V. and G. was willing to do business with the C., N. O. and T. P. at that particular time, and we took advantage of it.

Q. Then you know nothing concerning any interest the E. T. V. and G. had in the C., N. O. and T. P. Railway?

A. There was some kind of an interest, but I was not advised as to the details of the same.

394 Q. Do you know how long such interest had existed?

A. No, I can't state when that supposed interest you are talking about commenced.

Q. Do you know when the E., T. V. and G. was opened for traffic between Chattanooga and Atlanta?

A. Oh, that is a great many years ago.

Q. Be a little more specific, was it about 1881 or 1883?

A. Well, we were doing business with the E. T. V. and G. along in those years, I recall in 1887, '88, '89 and '90, through there, during my association my beginning with the C., N. O. and T. P. Railroad here.

Q. Is it not a fact that the E. T. V. and G. was open for traffic between——

A. What do you mean?

Q. Completed and open for traffic between Chattanooga and Atlanta shortly after the Cincinnati Southern was open for traffic between Cincinnati and Chattanooga?

A. That may be true, but I am not familiar with the date or the year, that that was the case, but I do know this; that during the time that we were handling traffic into the south in connection with the W. and A. we were also handling freight over the E. T. V. and G. I am talking about from 1888 on.

Q. Do you or not know that the E. T. V. and G. from the time of its opening, was always the preferred connection at Chattanooga of the Cincinnati, New Orleans and Texas Pacific for competitive freight to Atlanta and beyond?

A. Oh, I should say not,—I don't know that to be the case.

395 Q. Have you any knowledge on the subject at all?

A. I don't think that that was the case, we were doing business with both railroads.

Q. I said preferred connection?

A. I would not say that.

Q. It was the preferred connection when you first knew of it?

A. I would not say that it was the preferred connection at that particular time, but we did make it the preferred connection when the W. and A. and the N. and C. was opened as one line from Atlanta to Nashville, because it would have been business folly not to have done so.

Q. I understood you to say that had nothing to do with it, that before that time the E. T. V. and G. was the preferred connection because you were able to make the best arrangement with them, which I understood to be with reference to the exchange of traffic?

A. That was from 1890 on.

Q. And wasn't it true prior to 1890?

A. From 1890 on, I said nothing with respect to prior to that.

Q. What was it before that?

A. It was then simply the best proposition and at that particular time, although I haven't the papers to show for it, but this would be the natural view to take of it if our,—if we could make better terms with the E. T. V. and G. from a business standpoint, we would have done so and if we could have made better terms with the W. and A. we would have done so. Now, there were two routes open from Chattanooga to Atlanta and both of those routes were used by the C. N. O. and T. P. but to what extent both those routes were 396 used I can't say. I am talking about prior to 1890.

Q. I will ask you if you did not have practically the same arrangement, so far as the exchange of freight was concerned, or division, whatever it may be, with the East Tennessee, prior to 1890 that you had in 1890?

A. I should say not, no.

Q. What was the difference?

A. A big difference because both routes were then open to business the same as any other connection, whereas in 1890, the W. and A. *the W. and* A. was practically closed to the C., N. O. and T. P. because of this contract of lease to the N. C. and St. L. Now the C., N. O. and T. P. did business with the E. T. V. and G. and the W. and A. at Chattanooga in the same way that it did business with any other connection, on a purely business footing.

Q. I understand that, and do not understand me even to suggest that you have acted with any spirit of hostility. I am trying to get at what it was. I know you did what you considered the best business policy, but what I want to ascertain is this: What arrangement did you have with the E. T. V. and G. in 1888., when you went with the C., N. O. and T. P. how did that arrangement differ from the one year entered into in 1890, under the circumstances that then existed, the arrangement itself?

A. I have tried to explain the difference between the two. Prior to 1890 we had two connections and both were open for business, and it was purely a business proposition as between those two railroads. We wanted business from the E. T. V. and G. and we wanted business from the W. and A. and we were prepared to reciprocate 397 by delivering business to both of those roads. Now, if we received more business from the E. T. V. and G. at Chattanooga for the North than we received from the W. and A. in all probability we would turn over more business to the E. T. V. and G. on that, and if we received more business from the W. and A. we reciprocated by turning more business over to the W. and A. than we did to the E. T. V. and G. Now it was just a question of bargaining with those two railroads.

Q. Purely a question of exchange of traffic, was it?

A. And we found, and did find at different times, that the Western and Atlantic Railroad was strongly favorable to the Nashville gateway, and they were at that time delivering more traffic to the N. and C. going into this northern country than they were delivering to the C. N. O. and T. P. Now we endeavored to correct that and we have done so in a partial way, but we found that the general tendency was to force business from the W. and A. over the Nashville road, through Nashville. Now we may have favored the E. T. V. and G. because of that, but that was the only spirit that induced us to do it, if it was done. But as I said before it was simply a business proposition. If we could induce the W. and A. railroad to increase its business to us twenty per cent. for a given period we would increase ours twenty per cent and in doing that we would have to take it away from the East Tennessee. The situation prior to 1890 was entirely—was an open one as compared with that of 1890. If you were a railroad man you would appreciate that.

Q. But as I understand Mr. Biles, and I want to understand you fairly and clearly, the question of the amount of traffic that you
would give the Western and Atlantic and the East Tennessee,
398 Virginia and Georgia, at Chattanooga, depended upon two
propositions; first a matter of exchange of traffic, the exchange that they gave you in traffic, you reciprocated by giving them traffic in proportion to the traffic they gave you, and you also may have been influenced to prefer the East Tennessee, Virginia and Georgia, because of the fact that the Nashville, Chattanooga and St. Louis, or the Western and Atlantic Railroad, was giving a preference to the route, and——

A. Was the Nashville, Chattanooga and St. Louis lessee of the W. and A. prior to 1890?

Q. I am speaking of from 1890 on.

A. I thought you were talking about prior to 1890.

Q. I was, but *but* I am now trying to find out what you mean since 1890?

A. Well, from 1890 on we did consider the East Tennessee as our preferred connection because the W. and A. and the N. and C. were *ties* up as one line from Atlanta to Nashville, and it was foolish to suppose that the W. and A. with interests in the N. and C. would turn over business to the C. N. O. and T. P. at Chattanooga, as simply a business proposition and it would have been foolish for the C. N. O. and T. P. to turn over its business to the W. and A. and gotten no return for it.

Q. Now referring to the period prior to 1890 specifically, were you interested then in making the E. T. V. and G. *you* preferred connection at Chattanooga because you thought that the Western and Atlantic Railroad was preferring the route via Nashville?

A. No, as I explained just now, our arrangements at that time
were open, purely business arrangements. We endeavored
399 to do the best we could with both railroads and if we did
better with one than the other, we took advantage of it.

Q. The E. T. V. and G. had a larger system at that time than the Western and Atlantic?

A. Oh, yes.

Q. And naturally gave you more freight?

A. The East Tennessee had its railroad from Chattanooga to Brunswick and the Western and Atlantic had its railroad from Chattanooga to Atlanta, and had a very valuable connection in the Central of Georgia and it originated a great deal of traffic from the southern territory generally.

Q. Now, since 1906, has it still been your policy to give to you-connections reciprocity in the way of traffic, giving to them as they give to you?

A. What connections do you refer to?

A. Take the Western and Atlantic, since 1906, as I understand it all traffic from Atlanta and points beyond to Cincinnati and points beyond goes over the Cincinnati Southern Railway now, you get a very large volume of traffic and do you reciprocate and give a like volume of traffic to the Western and Atlantic, southbound business?

A. Traffic that comes to us or originates at Cincinnati and destined to Atlanta and beyond, routed via the Western and Atlantic, we turn over to that road.

Q. I understand, but where it is unrouted,—you do receive, and have received since 1906, practically all the north bound traffic of the Western and Atlantic Railroad, have you, in recognition of that fact, give- the Western and Atlantic *you* unrouted business to offset that?

A. None of it.

400 Q. Why?

A. Because we had a more valuable connection than the Western and Atlantic Railroad.

Q. What is that?

A. The Southern Railway.

Mr. Wimbish: That is all.

Mr. Colston: That is all.

Mr. Wimbish: Before we read the stipulation, you made some inquiries of Mr. Peyton in regard to the disclaimer,—I have been furnished with a certified copy of a resolution of the Board of Directors ratifying that.

(Counsel for the complainant tenders paper to counsel for the defendants).

Mr. Colston: You want to offer that?

Mr. Wimbish: Yes, sir.

Mr. Colston: We object to it because it was given or taken after, it is post litem motam.

Received in evidence and marked Complainant's Exhibit E.

Mr. Wimbish: I want these papers you have furnished me, this "Executive Order No. 79," and the extracts from the minutes of the meeting of the Board of Directors of these two companies thereto attached, to be attached to the stipulation and go in as a part of the record.

Mr. Colston: I will put it this way: Pursuant to the demand of counsel for the State of Georgia, defendant's counsel now produce the following documents: "Executive Order No. 79, Southern Railway System, dated Washington, D. C., January 17th, 1917.

Excerpt from minutes of meeting of Executive Committee of the Board of Directors of the Southern Railway Company held
401 pursuant to due notice at the office of the Company, No. 120 Broadway, New York, on Tuesday, January 16th, 1917.

Excerpt from minutes of meeting of the Board of Directors of the Southern Railway Company, held, pursuant to due notice, at the office of the Company, No. 120 Broadway, New York, on Tuesday, January 16th, 1917, at which meeting a quorum of the Board was present and voted.

Excerpt from the minutes of the meeting of the Executive Committee of the Board of Directors of the Cincinnati, New Orleans and Texas Pacific Railway Company held, pursuant to due notice, at the office of the Company No. 120 Broadway New York, on Wednesday, January 17th, 1917.

Excerpt from minutes of meeting of the Board of Directors of the Cincinnati, New Orleans and Texas Pacific Railway Company held, pursuant to due notice, at the office of the Company, Ingalls Building, Cincinnati, Ohio, of Thursday, May 17th, 1917, at which meeting a quorum of the Board was present and voted.

Mr. Wimbish: I offer those papers in evidence on behalf of the complainant in this case.

Received in evidence and marked Complainant's Exhibits "F," "G," and "H."

Mr. Colston: Defendants now rest their case in chief.

Mr. Wimbish: I may have some little testimony to offer in rebuttal, I have not decided fully yet, but will in a few days. It may be that I will only have some documentary evidence to offer.

Stipulation proposed by counsel for the defendants and agreed upon and signed by counsel for both sides, is delivered to the
402 examiner for transmission as a part of the record in the case.

Thereupon the hearing was adjourned to be resumed at such time and place as may be agreed upon by counsel, for the taking of testimony on behalf of the complainant, in rebuttal.

Atlanta, Ga.,

April 27, 1918.

Counsel for Complainant having notified the examiner that there will be no further testimony offered in behalf of the Complainant, the case is duly closed this 27th day of April, 1918.

The taking of testimony closed.

403 In the Supreme Court of the United States, October Term, 1917.

Original, No. 23.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans and Texas Pacific Railway Company.

Taxable Costs in Above-entitled Cause Paid by the Plaintiff.

Original Copy of testimony taken on behalf of the Complainant, at Atlanta, Ga., February 19th, and 20th, 1918. 104 pages at 25¢ per page....................	$26.00
Attendance of Examiner, 2 days at $10.00 per day........	20.00
Original Copy of testimony taken on behalf of the Complainant, at Chattanooga, Tenn., on March 22nd, 1918, 8 pages at 25¢ per page...........................	2.00
	$48.00
Proportionate share of postage transmitting the record and exhibits to the Court.............................	.66
	$48.66

404 In the Supreme Court of the United States, October Term, 1917.

Original, No. 23.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans and Texas Pacific Railway Company.

Taxable Costs in Above-entitled Cause Paid by the Defendants.

Original Copy of testimony taken on behalf of Defendants, at Chattanooga, Tenn., on March 22nd and 23rd, 1918, 171 pages, at 25¢ per page..........................	$42.75
Attendance of Examiner 2 days at $10.00 per day........	20.00
Expenses incurred on trip from Atlanta to Chattanooga, for the taking of testimony...........................	22.85
Original copy of testimony taken on behalf of the Defendants at Cincinnati, Ohio, on April 18th, 1918, 26 pages at 25¢ per page....................................	6.50

Attendance of Examiner, 1 day at $10.00 per day........	10.00
Expenses incurred on trip from Atlanta to Cincinnati and return, for the taking of testimony....................	35.80
Proportionate share of postage transmitting the record and exhibits to the Court............................	3.60
	$141.50

405 In the Supreme Court of the United States, October Term, 1917.

Original, No. 23.

THE STATE OF GEORGIA, Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and The Cincinnati, New Orleans and Texas Pacific Railway Company.

I, Edward L. Gilmore, Examiner, hereby certify that the above witnesses, J. H. Johnston, Hunter McDonald, Charles E. Herman, J. A. Sams, I. O. Walker, J. L. McCollum, John Howe Peyton, Isaac Pennebaker, Jacob Smith, R. B. Stegall, W. H. Ray, William Doyle, James Hickson, John H. Ribble, Peter Gorman, Wm. E. Wheelock, William M. Nixon, F. W. W*p*ampelmeier, Curtis Daugherty and G. P. Biles, were by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that their testimony was reduced to writing by me and that the reading over by the witnesses respectively and subscribing thereto was duly waived by counsel for the parties at interest; that the said testimony was taken pursuant to stipulation entered in this cause dated the fourth day of January, 1918, at the places stated in the record at the beginning of each hearing, beginning on *the* January 29th, 1918, and continuing on January 30th, March 22nd, and April 18th, 1918, as set forth; that the parties were represented at the taking of said testimony by their respective counsel as set forth; that the several exhibit- recited were offered in evidence and marked as
406 specially noted in the foregoing record; and that I am not counsel or relative of either party, or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand this 27th day of April, 1918.

EDWARD L. GILMORE, *Examiner.*

407 In the Supreme Court of the United States, October Term, 1917.

No. 23, Original.

The State of Georgia, Complainant,

vs.

The Trustees of the Cincinnati Southern Railway and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

Stipulation Between the Parties.

The parties to this cause, acting herein by their respective counsel as of record, stipulate and agree, subject to the rights of the defendants to object to the relevancy, materiality or competency thereof, as follows, to wit:

I. The Western & Atlantic Railroad is a line of railway extending from the City of Atlanta, in the State of Georgia, to the City of Chattanooga, in the State of Tennessee, a distance of 136.83 miles main line, of which 121.30 miles are within the State of Georgia, and 15.52 miles within Hamilton County, in the State of Tennessee. That portion of the right of way of the Western & Atlantic Railroad in controversy herein lies wholly within the said Hamilton County, Tennessee.

II. The building of the Western & Atlantic Railroad was initiated by the State of Georgia as a great public work under and pursuant to certain Acts and resolution of the General Assembly of the State of Georgia. The railroad was constructed wholly by the State of Georgia out of public funds of the State. That portion of the Railroad lying within the State of Tennessee was acquired and built under and pursuant to Legislative authority from the State of Tennessee. All of the property appertaining to said Railroad, including its rights of way and terminals, both in Georgia and in Tennessee, is exclusively owned by the State of Georgia directly and immediately, subject to such rights as the defendant may have, if any, to the property in controversy herein. The Railroad 408 has never been incorporated, nor has it any capital stock, the title to and ownership of the property residing in the State without any intermediary corporation or other agency.

III. It is stipulated that the several parties may introduce as part of the evidence any act, resolution or other public proceeding of the General Assembly of the State of Georgia, or of the State of Ohio, or of the State of Kentucky, or of the State of Tennessee, pertinent to the controversy in this cause without the necessity of making formal proof of the same, but this stipulation is not intended to prejudice the right of either party to offer and submit in evidence any other documentary evidence deemed pertinent to the cause, as provided in paragraph 3 of the stipulation of counsel for the taking of testimony, heretofore filed in this case.

IV. It is further stipulated as follows:

A resolution of the General Assembly of the State of Georgia, approved December 20, 1834 (Act- of 1834, page 288) refers to the varied products of the State and the inability of the inland produceto market his grain, cotton and supplies; recited that it had become apparent that the improvement of rivers and dirt or *plant* roads would prove insufficient to accomplish the end desired, and then sets forth the following declaration:

"Resolved, that the times require and the resources of the State authorize a scheme of internal improvements from the seaboard of this State by railroad, on the faith and credit of the State, as a great State work." (Objected to by the defendants as irrevelant and immaterial.)

Pursuant to a resolution adopted, and approved December 24, 1835, (Acts 1835, page 314) the State of Georgia was represented at a conference held at the City of Knoxville, Tennessee, on the 4th of July 1836, to consider the feasibility of building a grand trunk line from Cincinnati to some point on the Atlantic Seaboard. There had already been incorporated the Cincinnati & Charleston Railroad, having in view the building of a railroad between these cities. (Objected to by defendants as irrelevant, incompetent and immaterial).

409 In the message of Governor Schley in 1836, (House Journal 1836, page 22) reference is made to the convention held at Knoxville above referred to, and it was recommended that the State of Georgia should build a line of road to connect with the road proposed to be built from Cincinnati to the Atlantic Seaboard. At this time the Georgia Railroad, the Central Railroad & Banking Company of Georgia, and the Monroe Railroad Company had been incorporated, offering connection to the sea coast with such railroad as might be built by the State.

V. This was followed by an Act of the General Assembly of the State of Georgia, approved December 21, 1836 (Acts 1836, page 214) providing for the creation and building of a railroad with State funds, from some point on the Tennessee line, near the Tennessee river, commencing at or near Rossville to a point on the southeastern bank of the Chattahoochee river in the State of Georgia, most eligible for the extenſion of branch roads to other named points within the State, the name of the road so to be constructed was declared to be "The Western & Atlantic of the State of Georgia." Sections 1, 4, and 9 of said Act being as follows:

"Sec. 1st. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of the same, That a railroad communication as a State work, and with the funds of the State shall be made from some point on the Tennessee line, near the Tennessee river commencing at or near Rossville, in the most direct and practicable route, to some point on the southeastern bank of the Chattahoochee river, which shall be most eligible for the extenſion of branch railroads, thence to Athens, Madison, Milledgeville, Forsyth, and Columbus, and to any other points which may be designated by the Engineer or Engineers, surveying the same, as most proper and practicable, and on which, the Legislature may hereafter determine; Provided, that no greater sum than Three Hundred and Fifty Thousand Dollars, shall be appropriated, annually, to the work contemplated by this Act, unless a future Legislature shall otherwise direct."

410 "Sec. 4th. And be it further enacted, That when funds shall be needed to defray the expenses and cost of the work on said road, or for materials, or for the fulfilment of contracts, the same shall be applied for to the Executive, on the certificate of the superintendent, and on the production of said certificate, it shall be the duty of the Executive to make a requisition on said funds, for the amount of such certificate."

"Sec. 9th. And be it further enacted by the authority aforesaid that said railroad shall be known and distinguished as the Western & Atlantic Railroad of the State of Georgia."

But said entire Act is deemed as being in evidence.

VI. On December 23, 1836, (Acts 1836, page 3 of resolutions) a resolution was passed, requesting the Governor of Georgia to communicate to the Governor of Tennessee, the intention of the State of Georgia to build a railroad to a point upon the Tennessee river, and to ascertain upon what terms the State of Tennessee would be willing to allow the extenſion from the Georgia State line to the Tennessee river.

A joint resolution of the General Assembly of Georgia, passed November 23, 1837, was as follows:

"Resolved by the Senate and House of Representatives of the State – Georgia, in General Assembly met, that His Excellency, the Governor, be requested to despatch forthwith a special agent to negotiate in behalf of this State, with the Legislature of the State of Tennessee, now in session for the purpose of obtaining an Act from them authorizing the extenſion of our State road from the Georgia line through the territory of Tennessee, to the Tennessee river." (Acts 1837, page 270.)

Shortley thereafter, to wit, on December 4th, 1837, the General Assembly of Georgia adopted a resolution granting and securing to the State of Tennessee, or any company incorporated by that State, the right of constructing a railroad the same distance in the State of Georgia, with similar privileges and protection, for the purpose of connecting with the Western & Atlantic Railroad. (Acts 1837, page 271.)

411 On December 23, 1837, (Acts 1837, page 210) an Act was passed by the General Assembly of Georgia, declaring it to be deemed expedient that a permanent provision should be made for the successful and vigorous competi-on of the State road, in which Act it was provided that the road should be constructed beyond the State line in the territory of Tennessee to the Tennessee river, provided the right to do so could be secured on terms that might be deemed reasonable by the Governor of the State of Georgia.

VII. Pursuant to the direction and authority of the above referred to Acts and resolutions of the General Assembly of the State of Georgia, an agent of the State was despatched and did proceed to negotiate with the Legislature of Tennessee concerning the terms upon which the State of Georgia would be permitted to construct her road within the State of Tennessee. In his Executive message to the General Assembly, (Executive minutes 1834-39, page 490, etc.) Governor Gilmer stated that these negotiations had resulted in the adoption of an Act by the General Assembly of the State of Tennessee, passed January 24, 1938, entitled "An Act to authorize*d* the State of Georgia to extend her Western & Atlantic Railroad from the Georgia line to some point on the Eastern margin of the Tennessee River." A copy of this Act is set out in full at pages 6 and 7 of the answer of the defendants filed in this cause, and which provides among other things, "that the State of Georgia shall be entitled to all privileges, rights and immunities, (except the subscription on the part of Tennessee) and be subject to the same restrictions as far as they are applicable, as are granted made and prescribed for the benefit, government and direction of the Hiawassee Railroad Company," and the privileges, rights, immunities and restrictions granted, made and prescribed to and for the Hiawassee Railroad Company are those mentioned in the Act of the Legislature of Tennessee (local) of 1835-1836, page 23, and confers upon the Hiawassee Railroad Company the power to sue and be sued, and invest- that Company with power of eminent domain for the acquisition not only of lands necessary for the location of its railroad, but of adjacent lands needed for securing timber, stone, gravel, and earth necessary to keep said road in repair, and reserve*d* to said railroad the right to connect with other railroads.

412 VIII. Thereafter the State of Georgia proceeded to procure rights of way and entered upon the location and construction of her railroad within the State of Tennessee, but did not complete the work and open the road for through traffic between Atlanta and Chattanooga until May 20th, 1850. Operation from Chattanooga south to the tunnel at the 106th mile post from Atlanta began on December 1st, 1849. The last contracts for the completion of the road in its entirety were let on March 22d, in the year 1848.

On February 3rd, 1848, the General Assembly of Tennessee enacted an Act entitled "An Act to confer upon the State of Georgia additional rights in relation to the Western & Atlantic Railroad," a copy of which Act is set out in full at page 7 in the answer of the defendants herein, and by which Act the State of Georgia is granted all the right and is subjected to the restriction, as far as applicable of an Act of December 11, 1845, incorporating the Nashville & Chattanooga Railroad Company, which last named Act is found in Chapter one of the Acts of Tennessee of 1845-6, and prescribed that said Company should have power to receive by gift or purchase, and to hold, sell and convey real and personal estate, make contracts, sue and be sued, and to do all lawful acts proper incident to a railroad corporation, and proper for the transaction of the business of operating a railroad, and conferred upon it the right of eminent domain, and conferred upon the Courts of Tennessee jurisdiction to hear and determine all matters of controversy between that corporation and other parties.

IX. On November 10, 1851, the General Assembly of the State of Tennessee adopted by resolution a memorial addressed to the Legislature of Georgia, (Acts of the General Assembly of the State of Tennessee 1851-52, page 706) presenting certain grievances, and asking redress therefor. A correct copy of said memorial is attached as Appendix A to this stipulation, but counsel for the defendants object to the competency, relevancy and materiality of said memorial as evidence in this case, and to its being considered by the Court in connection with this case.

413 Thereafter the State of Georgia authorized suits against the Superintendent of the Western & Atlantic Railroad in his official capacity, in the Superior Courts of any county through which the road ran, in case any claim against the road could not be *be* adjusted between the aggrieved party and the Superintendent. (Acts 1851-52, page 110). By a further Act (Acts 1862-63, page 182) it was declared that all laws of force regulating the liability, in the State of Georgia for damages done through the operation of railroads, should be equally applicable to the Western & Atlantic Railroad.

X. The construction of the Western & Atlantic Railroad was begun in the year 1838, and was completed and opened for traffic between Atlanta and Chattanooga, on May 20th, in the year 1850. Prior to December 27, 1870, the railroad was operated as a common carrier by and in behalf of the State of Georgia under direct legislative authority by a Superintendent appointed by the Governor, without any incorporation, association or other intermediary, entity, or agency. The net income of the railroad was converted into the Treasury of the State to be used for public purposes. It was provided that the net income of the road after deducting expenses and all debts which are liens upon its income shall be paid into the Treasury of the State monthly, and shall first be applied to the payment of the principal and interest of the bonds of the State issued on account of said road; and the sources from which the State derives or may derive revenue, other than by taxation, are among others, "the net earnings of the Western & Atlantic Railroad." These provisions have been carried forward and appear in Sections 1327 and 1246 of the Code of Georgia for 1910.

XI. By an*d* Act of the General Assembly of the State of Georgia approved October 25, 1870, the Governor of the State was authorized to lease the Western & Atlantic Railroad together with all its property and appurtenances for a term of twenty years for the consideration and upon the conditions in said Act recited. Pursuant to this authority the said railroad was leased to certain parties who became incorporated as the Western & Atlantic Railroad Company, which said lease became effective and continued for a term of
414 twenty years beginning on December 27, 1870. Upon the
expiration of this lease, to wit, December 27, 1890, the Western & Atlantic Railroad, together with all its houses, workshops, rolling

stock, depots, and appurtenances of every kind and character was leased to the Nashville, Chattanooga & St. Louis Railway, a Tennessee corporation, for a term of twenty nine years thence next ensuing, under authority of and pursuant to the terms and conditions of an Act of the General Assembly of the State of Georgia, approved November 12, 1889. This lease is still outstanding, and will not expire until the 27th day of December, 1919. The lessee took possession under said lease and has been in possession ever since. By an Act of the General Assembly of Georgia approved November 30, 1915, the State of Georgia created the Western & Atlantic Railroad Commission, and conferred upon it authority to lease the Western & Atlantic Railroad for a term not to exceed fifty years, beginning upon the expiration of the present outstanding lease, to wit, December 27, 1919. Pursuant to this authority the said Western & Atlantic Railroad Commission, acting for and in behalf of the State of Georgia, entered into a contract of lease with the Nashville, Chattanooga & St. Louis Railway for an additional term of fifty years beginning December 27, 1919, upon the terms and conditions set out and recited in its said contract of lease.

The leases above referred to being those pleaded on pages 20 and 21 of the answer of the defendants filed herein.

XII. Under the terms of each of the leases above referred to the rental for the Western & Atlantic Railroad was and is to be paid monthly into the Treasury of the State; and by an Act of the General Assembly of Georgia (Acts of 1887, page 68) one-half of the proceeds of the rental of the Western & Atlantic, of one-half of the annual net earnings of said railroad under any change of policy which the State may adopt hereafter, shall be applied upon account of the support and maint*ai*nance of the common schools of the State of Georgia. (The last foregoing paragraph is objected to by the defendants as irrelevant and immaterial.)

415 XIII. It is further agreed that the Act of the General Assembly of the State of Georgia, approved October 8, 1879, under which the defendants claim the right to use the property in question is correctly set out as Exhibit A to the original bill herein; and that the Act of the General Assembly of Georgia, approved August 21, 1916, entitled "An Act to repeal an Act of the General Assembly of Georgia, approved October 8th, 1879, entitled An Act granting right of way to the Cincinnati Southern Railway, where its route adjoins that of the Western & Atlantic Railroad and for other purposes," is correctly set out as Exhibit C to the original bill; and further that Exhibit D to said bill is a correct copy of a communication in behalf of the Trustees of the Cincinnati Southern Railway to the State of Georgia, setting up claim of the said Trustees to the property in question, and declining to accept and abide by the terms of said Act of August 21, 1916.

XIV. Paragraph I of Section 16 of Article 7, of the Constitution of the State of Georgia 1877 in force on October 8, 1879, is as follows:

"Section 16.—Donations.

Paragraph I. Donations forbidden.—The General Assembly shall not by vote, resolution, or order, grant an*d* donation or gratuity in favor of any person, corporation, or association."

(Defendants object to this Paragraph XIV as being irrelevant, incompetent and immaterial.)

February 23rd, 1918.

(Signed) WILLIAM A. WIMBISH,
Counsel for the State of
Georgia, Complainant.
(Signed) JOHN W. PECK,
Of Counsel for the Trustees of the
Cincinnati Southern Railway.
(Signed) EDWARD COLSTON,
M. M. ALLISON,
Counsel for the Cincinnati, New Orleans &
Texas Pacific Railway Company.

416 Appendix "A."

Memorial of the Tennessee Legislature to the Legislature of Georgia.

The preservation of the Union of these States is an object of the highest importance, and demands the most profound consideration of every patriot and statesman. So far as any foreign or extraneous influence, calculated or intended to *e*ffect its permanence or impair its integrity, are concerned, we have nothing to fear, so long as a unity of sentiment on the subject of our national honor and national rights is cherished, and harmony of feeling is maintained at home, we have nothing to fear from the enemies of our institutions, though they come in the imposing form of the combined powers of earth.

Harmony among the States composing this great confederacy is not only essential to the advancement of all the great interests of the country, but is of indispensable importance to the very existence of the Union. It is therefore meet and proper that each of the States composing this great sisterhood, should labor, as far as may be in their power to avoid all just ground for complaint, and by all honorable means endeavor to shun everything that is calculated to produce an alienation of feeling, or in any *was* disturb the kind and friendly relations that should exist between members of the same great family. Cherishing sentiments of this character, wherever grievances are believed to exist, it is the manifest duty of the party aggrieved, in a spirit of kindness, confidence and frankness, to state the cause of complaint. And it is equally due to the party aggrieved, that the complaints should be received in the same spirit of kindness and — after an impartial investigation, they should be found to exist, every consideration of justice, magnanimity and patriotism demand their redress.

417 Profoundly anxious to maintain the kindness and most amicable relations with our sister State of Georgia, and feeling that these kindly relations would be best promoted by a frank presentation of the evils under which we labor, the General Assembly of the State of Tennessee would respectfully suggest to the Legislature of the State of Georgia, the following considerations:

It will be remembered by your honorable body, that an application was made by the General Assembly of your State to the Legislature of this State, during the winter 1837-8, for the privilege of extending her Western & Atlantic railroad from the Georgia line to the margin of the Tennessee river, within the limit of Tennessee, and that certain rights, powers, privileges and immunities, were granted to the said Western and Atlantic Railroad, on the express condition similar powers, rights, privileges and immunities should, on application, be conceded to the State of Tennessee, or her incorporated companies. In accordance with this agreement, during the winter of 1847, an application was made to the Legislature of Georgia for a grant of the rights and privileges as stipulated in the compact, to the Hiawassee, (now the East Tennessee and Georgia) Railroad Company. This application was promptly met, and the pledges faithfully redeemed.

The East Tennessee and Georgia Railroad Company, relying with implicit confidence on the good faith of the compact, have proceeded to construct their road through the territory of Georgia to the town of Dalton. In executing the powers thus granted to them, the East Tennessee and Georgia Railroad Company have met with many difficulties, and been subjected to many annoyances and inconveniences, resulting in serious damage to the Company, all of which they think are in contravention of the clearly expressed stipulations of the compact, and in violation of its spirit and intention.

These annoyances have been many and various, resulting in delays and damages, by the institution of lawsuits, greatly to the detriment of the Company, in violation of the claims of justice,
418 and in derogation of that spirit of concord, harmony and effection that should exist, not only between the states of sovereigns in equality, but between the citizens of these sovereignties.

We would, therefore, respectfully suggest to your honorable body, that you cause such inquiry to be made into those alleged wrongs, as justice, and a determination to maintain inviolate the plighted faith of the State may demand. And should they be found to exist, we doubt not your readiness to apply the corrective, and make all proper amends.

Having disposed of this question, you will pardon us for adverting to some other subject of mutual interest, and which seems to demand our consideration. Following the noble example which you have set us and your sister States of the South, in the adoption of an enlarged and liberal system of internal improvements, by which you have erected a monument for yourselves as enduring as time, we have partaken of the same spirit, and entered the field in the same race, and seek now in the infancy of our undertakings to establish such relations as may conduce to our common interest, and in the end, redound to the honor, peace and prosperity of all. You are doubtless aware that the citizens of this State, with such aid as the State has given them, have e*x*barked in a system of internal improvements of no small proportions. You are aware that several hundred miles of road is now being constructed in Tennessee amounting, when completed to not less than seven hundred, costing many millions of dollars, and all directed to your State road, and every mile of which must be tributary to your great lines of improvements, pouring their rich treasures into you- lap, not only by largely increasing the dividends on your works, but enlarging and multiplying your commerce to an extent as yet undefined, and which the imagination is *a*carcely bold enough to conjecture.

Seeing the vast community of interest springing up between us, and which if cherished and protected must go on multiplying and expanding to an almost unlimited extent, is it not most proper and important that we should now, in the incipiency of things, when
419 but few causes of complaint exist, when no feeling of distrust
have been engendered, to establish such an understanding and enter into such a comity, as will forever save us from discord, and establish such ties of friendship and relationship, of social and commercial i*n*dentity, as shall secure the harmony and interest of all, and establish the great princip*al* of a reciprocity of kind feeling, good offices and mutual dependence, on a basis as firm and immutable as time itself.

All the various roads now being constructed in this State, and in which you have a large interest, are the property of incorporated companies, the stock owned chiefly by individual stockholders, and consequently liable to all the restrictions imposed by their several acts of incorporation, and amenable to all responsibilties and liabilities of common carriers. These restrictions and liabilities are conceded to be essential to a just and reasonable protection of rights of persons and property. If by negligence, inattention, incompetency of officers or agents, or negligence of any kind, the rights or interests of any of your citizens are compromised or sacrificed, the remedy is plain, and the redress easy and certain. Not so in the case of the Western and Atlantic Railroad. This is exclusively the property of your State. Its property and rights are vested in a sovereignty, and consequently exempt from the liabilities that attach to individuals or companies of incorporation. Should damages result to citizens of your State, or ours, or any of our sister States, what remedy, what redress have we or they now, but such as a sense of justice of the Legislature may accord them, and which, if obtained, must be done with much delay and great expense. Difficulties enough in many instances to amount to a denial of justice, in consequence of the inconvenience of making the application to the only source of redress, the legislative power of your State.

May we not therefore ask that you will take such action as your sense of justice and fairness may suggest?—such as will place all interests involved on a footing of equality—such as will secure a faith-

ful administration of your road, quiet all apprehensions, and
420 give confidence and efficiency to our great enterprizes.

There is but one other point to which we would call your attention, and claim your earnest consideration. And that is the obstruction that exists at the Savannah River. However much may be said by the advocates of free trade between nations of the earth, on one side, or the opponents of that system on the other; however plausible their theories may be on the one side *of* the other, they have nothing to do with the question under consideration. So far as a full, free and unrestrained interchange of commodities between these States is concerned, there is no difference of opinion. In this all concur. Statesmen of all parties agree that useless, unnecessary and voidable restrictions to the full, free and liberal intercourse, social and commercial, between all the States of the Union, is at war with the spirit of our institutions, and dangerous to its harmony and stability, and in its tendencies subversive of the great charter of our rights, and of that spirit of kindness and friendship, without which the Union is a mere mockery, and cannot survive the conflicts of party and the storms of passion and prejudice. Whenever obstructions necessary and unavoidable are to be met, all will bow submissively to the burthens they impose. But when there is no such necessity, every sense of justice and equality demand their abatement. Devotion to the Union, equality of rights, the peace and happiness of society, the enlarged and liberal spirit of the *ago*, the age of progression and improvement, all demand their abatement. Is not this obstruction of this character, and does it not demand your favorable consideration? Is there any necessity for the continuance of this obstruction? Does the interest of your State require it, and is it in accordance with the great principles we profess? If one State may erect a barrier to the free intercourse between the States; then may another and another do the same thing, and when this spirit is turned loose on the country none can doubt the result—anarchy, discord and ruin must rule supreme.

421 When burthens imposed, by this obstruction, on the productions of the west, and the transportation of persons are most oppressive, amounting, for the short distance of less than one mile, to a cost equal to about sixty or seventy miles of railroad transportation. We will not trespass on your patience in this communication by enumerating the various items of cost thus imposed, but refer you to the schedule of freights and charges th*is* exacted. All political economists in our country agree that a tariff charge on a transfer of property between the States *in now* to be tolerated.

We are unable to see the difference between your laying a direct tax of 25 cents per bale on our cotton and 50 cents per capita on each individual who enter*es* your State and purposes to pass out of it, and the no less certain but more indirect process of compelling the same amounts to be paid in the shape of drayage and tolls. The result is the same. The injustice the same. It may be said that an act of incorporation has been granted to the owners of this property, and that it would be an act of bad faith to trespass upon rights thus vested. We do not ask or desire that the rights of States,

corporations or individuals shall, in the slightest degree, be violated or disregarded. None would go further than we, in maintain*u*ng them. We do not ask that the rights of any shall be assailed; we only ask that ours may be protected. If the Legislature of your State has parted with her sovereignty and control over this subject, we do not invite here to an act of bad faith. But has she done this? We understand not. Suppose, however, that the power to control bridges over the Savannah river for three or four miles up and down be granted to the corporation of Augusta, we would not have it violated, except by consent of payment of an equivalent; and we cannot doubt that conside*t*ations connected with the interests of citizens of Georgia as well as those of Tennessee and Kentucky, and in fact the great West, most likely soon to be placed in connection by railway improvements, will powerfully induce your honorable body to pecuniary appropriations, or some other legitimate means which may effect the desired object. Granting this right, which is alleged not to exist, none will doubt the power of your honorable body to
grant the Georgia Railroad Company, or any other company
422 you may choose to incorporate, the power to construct a road
and build a bridge above or below the territory thus assumed
to have been consecrated to the special use and benefit of the corporation of Augusta.

Candor and friendship require that we should say, that this question is one of great importance to the interest of our citizens, and that — is a cause of much and grow*n*ing complaint, doing no good to the commercial intercourse which we hope to see established between two States so intimately connected in everything that is calculated to advance our interest, honor and prosperity.

Having presented these subjects to your consideration, we cannot doubt that their importance will at once be obvious to you. Nor do we permit ourselves to doubt but that you will receive this communication in the same spirit of candor, frankness and friendship, in which it is d*e*ctated, and that your wisdo*n* will suggest such remedies as justice demands, and the great interests involved.

Resolved, That this communication be and the same is hereby adopted by the General Assembly of the State of Tennessee, and that James A. Whitesides, be, and he is hereby appointed a Commissioner on the part of this State, to communicate the same to the General Assembly of the State of Georgia, and use such efforts to secure the accomplishment of the objects co*m*templated as may be in his power.

Resolved, That his Excellency, the Governor of Tennessee be authorized to transmit to the commissioner, Mr. James A. Whitesides, the memorial and resolution of this Legislature to the Legislature of Georgia, setting forth the *frievences* of which the people of Tennessee complain, and request his prompt attention to the same.

JORDAN STOKES,
Speaker of the House of Representatives.
M. R. HILL,
Speaker of the Senate.

Adopted, November 10, 1851.

(Acts of the State of Tennessee, passed at the First Session of the Twenty-ninth General Assembly for the years 1851-2, pages Nos. 706, 707, 708, 709, 710 and 711.)

423 *Defendants' Stipulation.*

Filed Apr. 18, 1918. Edward L. Gilmore, Examiner.

In the Supreme Court of the United States.

No. 23, Original.

The State of Georgia, Complainant,

vs.

The Trustees of the Cincinnati Southern Railway and The Cincinnati, New Orleans & Texas Pacific Railway Company, Defendants.

The parties to the above case stipulate therein, by their respective counsel, as follows, subject to the right of any party to object to any matter contained in said stipulation on account of irrelevancy, immateriality or incompetency:

I.

The City of Cincinnati, in the State of Ohio, was authorized and empowered by said State to construct and own a line of railway entending from said City to the City of Chattanooga in the State of Tennessee, known as the Cincinnati Southern Railway, having a single or double track, together with all necessary side-tracks, turnouts, work-shops, depots, and other necessary appurtenances 424 and appendages, together with a line of telegraph, by a public and general Act of the General Assembly of the State of Ohio, entitled "An Act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants," which was passed and took effect May 4, A. D. 1869, found in Vol. 66 Ohio Laws, page 80.

II.

Pursuant to the provision- of said act the Council of the City of Cincinnati, on the 4th day of June, 1869, declared by resolution the necessity of a railway, and designated Cincinnati, Ohio, and Chattanooga, Tennessee, as the termini. The election provided for in said act was held June 26, 1869, and resulted in 15,435 votes being cast in favor of providing said line of railway, and 1,500 votes being cast against the same. Said City Council declared by resolution the said result, and on June 30, 1869, upon due application to the Superior Court of Cincinnati said Court appointed Richard M. Bishop, Edward A. Ferguson, Miles Greenwood, Philip Heidelbach and William Hooper Trustees of the Cincinnati Southern Railway, and they were each duly qualified as such. *The* met and organized as a board by the election of Miles Greenwood as president and H. H. Tatem as Secretary. The vacancies that occurred from time to time in said board, by reason of death, resignation or otherwise, have at all times been filled, as provided by law, up to the time of the commencement of this suit, at which time said trustees were those named as defendants in the present Bill of Complaint.

The State of Ohio has divers and sundry general and public acts of the General Assemble of said State supplementary to said original act of May 4, 1869, authorized additional bond issues by the Trustees of the Cincinnati Southern Railway, in the name of the City of Cincinnati, the proceeds whereof were to be applied by the said Trustees for the further construction and completion of said railway under the powers granted in said original act; the total issue of such bonds, up to the time of the commencement of this action, being $21,550,000.00.

III.

Tennessee Legislation.

Requisite legislation to enable the said trustees to construct
425 said railway through the State of Tennessee was obtained
from the State of Tennessee by an act passed by the General Assembly of that State January 20, 1870, entitled "And Act to authorize the extension and construction of the Cincinnati Southern Railway within the State of Tennessee," Chapter XLIII. Acts 1869-1870, page 291. Said act of Tennessee authorized the Board of Trustees, by the name of "Trustees of the Cincinnati Southern Railway," to extend, construct and maintain within the State of Tennessee, the said line of railway with a single or double track, with all the usual appendages, including a line of telegraph, and to exercise, within the State of Tennessee, all the powers invested in said Trustees by said act of May 4, 1869, of the General Assembly of the State of Ohio, and did authorize said Trustees to select a route for said railway, commencing at a point within the City of Chattanooga to be selected by said Trustees, and running through certain counties named, including the County of Hamilton in the State of Tennessee, to the northern bound-ry line of said State, so as to connect said line of railway with the same line of railway in the Commonwealth of Kentucky; and did give unto said Trustees the power to acquire, for the purpose of constructing and maintaining said railway and appendages, and to hold by purchase or gift, any land in the vicinity of or through which said selected route might pass, and to occupy or use for that purpose any land that said Trustees might deem necessary or convenient, and to acquire the same, if necessary, by appropriation, in the manner provided by the Code of Tennessee for taking private property for works of internal improvement, and to change the location of said route, without departing

from the general direction thereof; and did further provide that whenever along the route selected there shall be a railroad already constructed, or the rights of way or depot or other grounds acquired therefor, which railroad, rights of way or gounds could be adopted as part of the line of said Cincinnati Southern Railway, it should be lawful for the persons, company or corporation owning the same to sell to said Trustees of the Cincinnati Southern Railway the said railroad, rights *or* way or grounds, or any part thereof, upon such terms and conditions as might be agreed upon between the said Trustees and such person, *of* the president and directors of 426 such company or corporation. That long prior to the commencement of this suit, the said Cincinnati Southern Railway was located and constructed by the Trustees thereof, pursuant to the authority hereinbefore mentioned, on a route selected by the Trustees, from the City of Chattanooga to the northern bound-ry of the State of Tennessee so as there to connect with the line of the Cincinnati Southern Railway in the Commonwealth of Kentucky.

Kentucky Legislation.

By an Act of the General Assembly of the Commonwealth of Kentucky, approved February 13, 1872, entitled "An Act to authorize the Trustees of the Cincinnati Southern Railway to acquire the right of way and to extend the line of railway through certain counties in this Commonwealth," Chapter 272, rights and powers to construct said line of the Cincinnati Southern Railway through that Commonwealth, similar in character to those conferred by said Tennessee Act, were conferred upon the Trustees of the Cincinnati Southern Railway; and pursuant thereto, and long anterior to the commencement of this suit and the occurrences of the matters therein complained of, said line of the Cincinnati Southern Railway was constructed from the north shore of the Ohio River, at low watermark bounding the City of Cincinnati, Ohio, through said Commonwealth of Kentucky to a connection with said line of railway at the north boundary of the State of Tennessee referred to in said Tennessee Act.

IV.

Completion of Cincinnati Southern Railway to a Junction with the Western & Atlantic Railroad at Boyce's Station, so as to Admit of Passage of Trains from Cincinnati to Chattanooga, in Accordance with the Act of the General Assembly of the State of Ohio passed May 15, 1878, 75 Ohio Laws, p. 559 (Bates' Revised Statutes of Ohio sec. 8333).

427 By August 26, 1878, the Cincinnati Southern Railway had been completed from Ludlow in Kenton County, Kentucky, a point on the south bank of the Ohio river opposite Cincinnati, to Somerset in Pulaski County, Kentucky, a distance of 158 miles. At that time, from Somerset to Boyce's Station, Tennessee, a distance of

173.03 miles, nearly all the right of way for the Cincinnati Southern Railway had been secured, and much construction work had been done and material distributed. On said August 26 a contract was duly entered into between said Trustees and R. G. Huston & Co. for the completion of said railway from said Somerset to a junction with the Western & Atlantic Railroad at Boyce's Station, so as to admit of the passage of trains from Cincinnati to Chattanooga. This contract was duly performed by said contractor.

On May 19, 1879, the Trustees gave a determinable license to The Cincinnati Railroad Company, incorporated and organized under the laws of the State of Ohio as a common carrier company, to operate the Cincinnati Southern Railway from Cincinnati to Somerset, Kentucky, and later said license was extended to include the operation of said road to and into Chattanooga, said company supplying the rolling stock for that purpose. There has been a prior license company called "The Cincinnati Southern Railroad Company" whose license ceased on said last named date.

On September 6, 1879, said first named company made a contract approved by the Trustees, with the Western & Atlantic Railroad Company, then lessee of the Western & Atlantic Railroad, whereby said Western & Atlantic Railroad Company did license and grant to the said Cincinnati Railroad Company, for the period of two years commencing December 1, 1879, the right to pass and repass, and have full and free ingress and regress with its engines, cars, officers, agents and servants to, over, upon and along the main and side-tracks, turnouts, switches, turn-tables, and other like conveniences of that portion of the said Western & Atlantic Railroad from said Boyce's Station into Chattanooga, including all connections with other railroads therein as far as said Western & Atlantic Railroad Company had the power to grant such privileges in connection with other roads, together with the right, so far as said Western &
428 Atlantic Railroad Company could grant it, to use the passenger depot in Chattanooga, used and occupied jointly by it, the Nashville, Chattanooga & St. Louis Railroad Company, and the East Tennessee, Virginia & Georgia Railroad Company. That the said passenger depot in Chattanooga was the depot commonly known as the Union Depot, fronting on Ninth Street in said city. That the said Cincinnati Railroad Company undertook and agreed to pay the said Western & Atlantic Railroad Company for said privileges the sum of five hundred dollars per mile per annum, counting the distance six miles, in equal monthly installments on the first day of each month. That said Cincinnati Railroad Company took possession of and exercised the rights and privileges named in said license or grant of date May 19, 1879, and on February 21, 1880 operated the first through freight trains from Cincinnati to Chattanooga, and on March 8, 1880, the first passenger trains between those points, passing its cars, locomotives, etc., over the rails of the Western & Atlantic Railroad between Boyce's Station and Chattanooga; and the Cincinnati Railroad Company continued the use of said Western & Atlantic rails under said license and grant of September 6, 1879, until the summer of 1881, when the main line

of the Cincinnati Southern Railway, constructed on the right of way of the Western & Atlantic as authorized by the State of Georgia by Act of October 8, 1879, was made ready for passage of through traffic. That said "determinable license" of date May 19, 1879, given by said Trustees to the said Cincinnati Railroad Company terminated October 11, 1881, when the permanent lease hereinafter mentioned was made to The Cincinnati, New Orleans & Texas Pacific Railway Company.

Wherever the word "Trustees" is mentioned in this stipulation it means those who constitute the Board of Trustees of the Cincinnati Southern Railway. Such Trustees are appointed for life. The terms of office of the present Trustees, defendants in this case, began on the following dates, respectively:

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Trustees.	Date of appointment.
Levi C. Goodale	January 2, 1904
David G. Edwards	November 23, 1907
Washington T. Porter	November 10, 1908
John W. Peck	November 23, 1914
Henry T. Hunt	January 19, 1915

All those who were Trustees prior to the present incumbents died before this suit was begun.

V.

The Cincinnati, New Orleans & Texas Pacific Railway Company.

On the 7th day of September, 1881, The Cincinnati, New Orleans & Texas Pacific Railway Company was incorporated under the laws of the State of Ohio as and for a common carrier company, pursuant to an Act of the General Assembly of the State of Ohio entitled "An Act authorizing the organization of common carrier companies," passed April 12, 1877 (74 Ohio Laws, page 84; sec. 3838 Revised Statutes of Ohio). Among other powers granted to that company by said act were the following:

(1) To make all contracts lawful for natural persons to make for the carriage of persons and property.

(2) To lease and to hold and operate any line of railroad and its appendages, either before or after its completion, owned by a municipal corporation of Ohio, and any railway connected therewith lying without said State, and such portion of any railroad within said State as may be necessary.

(3) To construct or complete and equip any railway and its appendages *with* it is authorized to lease.

That on October 11, A. D. 1881, the Trustees of the Cincinnati Southern Railway did duly lease to said The Cincinnati, New Orleans & Texas Pacific Railway Company, for a period of twenty-five years then next ensuing, the line of railway known as the Cincinnati Southern Railway, extending from its terminus in Cincinnati to its terminus in Chattanooga, Tennessee, together with all the 430 works and conveniences of said railway, and all rights of way belonging to or that might thereafter be acquired by the Trustees of said Cincinnati Southern Railway for said railway, together with all privileges and franchises appertaining to said railway. That said Cincinnati, New Orleans & Texas Pacific Railway Company took full and immediate possession of said Cincinnati Southern Railway, its properties, appendages and appurtenances, including use of the right of way of the Western & Atlantic Railroad claimed by the Trustees of the Cincinnati Southern Railway under said Georgia Act of October 8, 1879.

That on March 18, 1893, by order of the Circuit Court of the United States for the Southern District of Ohio, Western Division, Case No. 4598, wherein Samuel Thomas was complainant and said The Cincinnati, New Orleans & Texas Pacific Railway Company was defendant, Samuel M. Felton was appointed receiver of said Railway Company and took possession of all its property necessary for the operations of said line of railway, and did operate the same as such receiver until September 30, 1899, at which time said receivership was lifted and all of the property of said Cincinnati, New Orleans & Texas Pacific Railway Company that had been thereunder was relieved thereof.

On June 7, 1902, a certain contract known as "Contract of Modification and Extension of Lease" was entered into by and between the Trustees of the Cincinnati Southern Railway, thereunto duly authorized, and The Cincinnati, New Orleans & Texas Pacific Railway Company, whereby the terms and conditions of said lease were altered in certain respects, and the term thereof was extended so as to expire October 12, 1966.

That on or about the 15th day of May, 1880, the Trustees commenced the construction of the Cincinnati Southern Railway from Boyce's Station to Chattanooga, on the right of way authorized by the Act of October 8, 1879, and said railroad, so built, was ready for use prior to October 11, 1881, the date on which said lease 431 of the Cincinnati Southern Railway to The Cincinnati, New Orleans & Texas Pacific Railway Company heretofore mentioned, took effect.

VI.

Western & Atlantic Right of Way.

On June 28, 1879, the question of the selection of the route of the Cincinnati Southern Railway between Boyce's Station and Chattanooga was settled by the Trustees by the selection of a route parallel with and adjoining but not on the right of way of the Western & Atlantic Railroad, and the land for such right of way was acquired by said Trustees prior to October 8, 1879, the date on which the State of Georgia made the grant to the Trustees of the Cincinnati Southern Railway that is in controversy in this case. The minutes of date November 20, 1879, of the Western & Atlantic Railroad

Company, the lessee of the Western & Atlantic Railroad referred to in said Act of October 8, 1879, show that a copy of the Act of the Legislature of the State of Georgia, approved October 8, 1879, granting the use of the right of way to the Trustees of the Cincinnati Southern Railway, between Boyce's Station and Chattanooga, was entered upon its minutes, and that that company gave its consent that the Cincinnati Southern Railway "build its tracks from Boyce's Station to Chattanooga on the right of way of the Western & Atlantic Railroad, upon the terms and conditions specified in the said Act of the Legislature, and upon the further condition that the crossing of the track of the Western & Atlantic Railway at Chattanooga be made in a manner satisfactory to the president and general manager and superintendent of this company;" and it was then further resolved by said Western & Atlantic Railroad Company that "all the details of the connections and other matters necessary to complete the work to be referred to the president and general manager and superintendent of this company with power to act," and that said work was completed accordingly.

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VII.

Relations of the Southern Railway Company and the Cincinnati, New Orleans & Texas Pacific Railway Company.

The common stock of The Cincinnati, New Orleans & Texas Pacific Railway Company is $3,000,000 divided into shares of $100 each, and the preferred stock is $3,000,000 divided into shares of $100 each. The preferred stock has no voting right.

The Southwestern Construction Company, a corporation under the laws of the State of New Jersey, owns 20,493 shares (68.5%) of the common stock of The Cincinnati, New Orleans & Texas Pacific Railway Company, and has done so for several years last past.

The remainder of the common stock of The Cincinnati, New Orleans & Texas Pacific Railway Company is owned by the public.

The Southern Railway Company owns 3,235 shares (15.7%) and The Alabama Great Southern Railroad Company owns 9,751 shares (47.5%) of the stock of Southwestern Construction Company.

The remainder of the stock of the Southwestern Construction Company was owned by The Cincinnati, Hamilton & Dayton Railway Company, a corporation under the laws of Ohio, but is now the property of The Baltimore & Ohio Railroad Company.

The Southern Railway Company owns 56.5% of the stock of The Alabama Great Southern Railroad Company.

The Board of Directors of The Cincinnati, New Orleans & Texas Pacific Railway Company consists of nine persons who are elected annually at stockholders' metting held at Cincinnati, Ohio, it being the practice at such election that the Southern Railway Company nominate four can-idates for directors, and that the Baltimore & Ohio Railroad Company nominate four, and that these two interests nominate a ninth candidate. Cumulative voting is allowed under the laws of Ohio at such election.

433 The Directors of the Southern Railway Company are as follows:

Edwin A. Alderman	Charlottesville, Va.
J. Kerr Branch	Richmond, Va.
John W. Grant	Atlanta, Ga.
Adrian Iselin, Jr.	New York.
Robert Jamison, Sr.	Birmingham, Ala.
Augustus D. Juilliard	New York.
John Carlisle Kilgo	Charlotte, N. C.
Charles Lanier	New York.
Jackson E. Reynolds	New York.
H. B. Spencer	Washington, D. C.
Charles Steele	New York.
Fairfax Harrison	Belvoir, Va.

The Directors of the Cincinnati, New Orleans & Texas Pacific Railway Company are as follows:

L. A. Ault	Cincinnati.
C. W. Galloway	Cincinnati.
T. C. Powell	Cincinnati.
Wm. Cooper Proctor	Cincinnati.
George M. Shriver	Baltimore, Md.
Morrison R. Waite	Cincinnati.
Daniel Willard	Baltimore, Md.
Fairfax Harrison	Belvoir, Va.

Mr. Fairfax Harrison now is, and for several years last past has been, President of the Southern Railway Company and President of The Cincinnati, New Orleans & Texas Pacific Railway Company.

Samuel Spencer, who died on November 29, 1906, was then President of the Southern Railway Company and has been such since its organization sometime in 1894. He became President of The Cincinnati, New Orleans & Texas Pacific Railway Company on October 16, 1899, and was such at the time of his death.

W. W. Finley seceeded Mr. Spencer as President of the Southern Railway Company and as President of The Cincinnati, New Orleans & Texas Pacific Railway Company, and held both positions until his death, which occurred November 25, 1913, when he was succeeded in both positions by Mr. Fairfax Harrison.

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VIII.

The Southern Railway System is composed of the Southern Railway, the Cincinnati, New Orleans & Texas Pacific Railway, the Alabama Great Southern Railroad, the New Orleans & Northeastern Railroad, the Harriman & Northeastern Railroad, and the Northern Alabama Railway. Such of these railroads as lie west of a meridian passing through Atlanta, Georgia, including the Cincinnati, New Orleans & Texas Pacific Railway Company, constitute what is known as the Southern Railway System Lines West, while the railroad lying east of said meridian are denominated Southern Railway System Lines East. Of each of the railroad companies whose roads constitute said Southern Railway System Mr. Fairfax Harrison is President, F. S. Wynn is Secretary, H. C. Ansley is Treasurer, and A. H. Plant is comptroller. E. H. Coapman is Vice-President in charge of operation. T. C. Powell, Vice-President, is resident executive of*if*-er west of said meridian, and is in charge of the traffic on lines west of said meridian. Lincoln Green is Vice-President in charge of lines east of said meridian. The operating department under Mr. E. H. Coapman, Vice-President, is divided into Lines East and Lines West. The general operating officers of Lines West include the following:

Horace Baker, General Manager, Cincinnati, Ohio.

W. S. Andrews, General Superintendent of Transportation, Cincinnati, Ohio.

C. Dougherty, Chief Engineer Maintenance of Way and Structures, Cincinnati, Ohio.

All the railroads in the said System Lines West are operated under the same general officers.

The Cincinnati, New Orleans & Texas Pacific Railway Company is a separate corporation under the laws of the State of Ohio, although its railway has been included in the Southern Railway System Lines West.

The Southern Railway System is not a corporation and has
435 no legal entity, but is an association of affiliated lines for convenient and economical administration and operation. There has been no merger of the lines of the Cincinnati, New Orleans & Texas Pacific Railway Company with those of the Southern Railway Company *of* other affiliated lines. The Cincinnati, New Orleans & Texas Pacific Railway Company maintains its own Treasurer and Auditor, its own Board of Directors, its own General Counsel, and maintains and keeps its own separate earnings, and pays therefrom its own expenses only, and its own dividends, separate and independently of any other railroad in the Southern Railway System.

(Signed) THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By EDWARD COLSTON,
MICHAEL M. ALLISON,
Solicitors.
THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY.
JOHN W. PECK,
W. T. PORTER,
Solicitors.
WILLIAM A. WIMBISH,
Solicitor for The State of Georgia, Complainant.

436 COMPLAINANT'S EXHIBIT "A."

February 20th, 1918. Edward L. Gilmore.

STATE OF TENNESSEE,
County of Davidson:

Know all men by these presents:

The Nashville, Chattanooga & St. Louis Railway, as Lessee of the Western & Atlantic Railroad from the State of Georgia, pursuant to an Act of the General Assembly of said State, approved November 12th, 1889, hereby disclaims any and all right to the possession, use, occupation or enjoyment of that part of the original right of way of the said Western & Atlantic Railroad in Hamilton County, Tennessee, between Boyce Station and Chattanooga lying westerly of a line running parallel with and nine and one half (9½) feet from the center of the track of the Western & Atlantic Railroad, which at the time of said lease was, and now is, being used and occupied by The Cincinnati, New Orleans & Texas Pacific Railway Company, as lessee of the Cincinnati Southern Railway; and in the event the said lease should be construed as vesting in or transferring to the Lessee any right to possession, use, occupation or enjoyment of said parcel of land hereinbefore referred to, in presenti or in futuro, the Nashville, Chattanooga & St. Louis Railway, as such Lessee, hereby surrenders and transfers to the State of Georgia absolutely and unconditionally, but without recourse, any and all such right to the possession, use, occupation or enjoyment of said property for any purpose whatever.

In witness whereof, The Nashville, Chattanooga & St. Louis Railway has caused these presents to be executed in its name and behalf by John Howe Peyton, its President, and has caused its corporate seal to be hereunto attached by its Secretary of this 16th day of February, 1917.

[SEAL.]

JOHN HOWE PEYTON,
As President of The Nashville, Chattanooga & St. Louis Railway.

Attest:
T. A. CLARKSON, *Secretary.*

437 COMPLAINANT'S EXHIBIT "B."

3/22/18. E. L. G.

Copy of Report of Counsel to the Western & Atlantic Railroad Commission Concerning the Cincinnati Southern Railway, Presented to the Commission on February 13, 1917.

"Under the Act of 1889 the State leased to the Nashville, Chattanooga & St. Louis Railway for a term not yet expired, "The Western

& Atlantic Railroad, together with all of its houses, work shops, rolling stock, depots and appurtenances of every kind and character." It is to be observed that the description was indefinite and general and did not undertake to define the particular character or extent of the properties constituting the Western & Atlantic Railroad. The State did not in that lease, nor does it ever, warrant title or convey anything more than such title, right or interest as the State at the time may have. Nor is there any special covenant that after acquired property or subsequent additions shall come within and be included in the terms of the contract of lease. At the time of this lease the Cincinnati Southern Railway was using and occupying that portion of the right of way now in dispute, under authority from the State of Georgia to do so. That possession and use was in its nature exclusive; so that the lessee from the State did not acquire any right to its possession or to its use, or any interest therein or control thereover. In my opinion it therefore follows that not only title; but also the right to present possession and use of this property, resides exclusively in the State, and that the State alone is the proper party to assert this right in any proceeding that may be necessary to recover possession and use.

I suggest nevertheless that it would be desirable and advisable if the present lessee will execute to the State its disclaimer of any right of possession or use of the particular property under the present outstanding lease; and further that if its has such right as a matter of law that it surrender and transfer the same to the State.
438 This disclaimer and surrender must, of course, be unequivocal and unconnected with any promise that the State, in event of recovery, would consider the property as having been included in the lease.

If counsel for the lesse- concurs in this view, and the disclamer and surrender be executed, all difficulty or question with respect to the right of the State to institute the suit will be removed."

Respectfully submitted.

(Signed) WILLIAM A. WIMBISH,
Counsel for the Western & Atlantic Railroad Commission.

STATE OF GEORGIA,
Fulton County:

I, J. Groves Cohen, Secretary of the Western & Atlantic Railroad Commission, a body duly created by the laws of the said State of Georgia, do hereby certify that the foregoing typewritten matter is a true and accurate transcript of report of Counsel to the Western & Atlantic Railroad Commission, concerning the Cincinnati Southern Railway, presented to the Commission on February 13, 1917.

Witness my hand, this 26th day of March, 1918.

(Signed) J. GROVES COHEN,
Secretary of the Western & Atlantic, Railroad Commission.

439 COMPLAINANT'S EXHIBIT "C."

3/22/18. E. L. G.

February 24th, 1917.

Hon. C. N. Candler, Chairman Western & Atlantic Railroad Commission, Atlanta, Ga.

MY DEAR MR. CANDLER: This is to advise you that Mr. John Howe Peyton, as President of the Nashville, Chattanooga & St. Louis Railway, has duly executed the disclaimer and surrender of all right to possession to that part of the right of way of the Western & Atlantic Railroad occupied by the C. N. O. & T. P. Railway and the Cincinnati Southern.

You have a copy of this disclaimer, so I will for the present retain the original as I may be required to use it.

Very truly yours,

COUNSEL.

440 COMPLAINANT'S EXHIBIT "D."

3/22/18. E. L. G.

Copy of Extract from Minutes of Meeting of the Western & Atlantic Railroad Commission Held on April 16, 1917.

Counsel Wm. A. Wimbish made statement to the Commission outlining the action which he had taken, under authority of the Commission at its meeting on February 13th, in the matter of the State of Georgia vs. The Cincinnati Southern Railway and the Cincinnati, New Orleans & Texas Pacific Railway, Lessee, stating that he had prepared and filed in the Supreme Court of the United States an application with the practice of the Court; that the application had been granted and the defendants directed to make answer thereto by October 2nd, 1917. Counsel stated further that he had received from The Nashville, Chattanooga & St. Louis Railway duly executed, the surrender and disclaimer requested of them in this case.

I, J. Groves Cohen, Secretary of the Western & Atlantic Railroad Commission, a body duly created by the laws of the said State of Georgia, do hereby certify that the foregoing typewritten matter is a true and accurate transcript of an extract from the minute*d* of the Western & Atlantic Railroad Commission, at its session held on April 16, 1917, which said meeting was the first of the Commission held subsequent to February 13th, 1917.

Witness my hand, this the 27th day of March, 1918.

(Signed) J. GROVES COHEN,
Secretary of the Western & Atlantic Railroad Commission.

441 COMPLAINANT'S EXHIBIT "E."

4/18/18. Edward L. Gilmore.

Whereas, The Nashville, Chattanooga & St. Louis Railway as lessee of the Western & Atlantic Railroad, did, on February 16th, 1917, execute through its President and Secretary the following paper, to-wit:

Know all men by these presents:

The Nashville, Chattanooga & St. Louis Railway as Lessee of the Western & Atlantic Railroad, from the State of Georgia, pursuant to an Act of the General Assembly of said State, approved November 12th, 1889, hereby disclaims any and all right of the possession, use, occupation or enjoyment of that part of the original right of way of said Western & Atlantic Railroad in Hamilton County, Tennessee, between Boyce Station and Chattanooga, lying westerly of a line running parallel with and nine and one-half ($9\frac{1}{2}$) feet from the center of the *tract* of the Western & Atlantic Railroad, which at the time said lease was, and now is, being used and occupied by the Cincinnati, New Orleans & Texas Pacific Railway Company, as lessee of the Cincinnati Southern Railway; and in the event the said lease should be construed as vesting in or transferring to the Lessee and right to possession, use, occupation or enjoyment of said parcel of land hereinabove referred to, in presenti or in futuro, The Nashville, Chattanooga & St. Louis Railway, as such Lessee, hereby surrenders and transfers to the State of Georgia absolutely and unconditionally, but without recourse, any and all such right to the possession, use, occupation or enjoyment of said property for any purpose whatever.

In witness where-, The Nashville, Chattanooga & St. Louis Railway has cause- these present- to be executed in its name and behalf by John Howe Peyton, its President, and has caused its corporate seal to be hereunto attached by its Secretary on this 16th day of February, 1917.

[SEAL.] JNO. HOWE PEYTON,
As President of the Nashville, Chattanooga & St. Louis Railway

442 Attest:
[SEAL.] T. A. CLARKSON, *Secretary.*

Now, therefore, be it

Resolved by the Board of Directors that the execution of said paper is hereby approved, ratified and confirmed in every respect as of the date of its execution.

It is hereby certified that the foregoing is a true copy of a preamble and resolution unanimously adopted by the Board of Directors of

The Nashville, Chattanooga & St. Louis Railway at a regular meeting held April 9, 1918, at which a quorum was present.

[SEAL.] (Signed) T. A. CLARKSON, *Secretary*.

Nashville, Tennessee, April 16, 1918.

443 COMPLAINANT'S EXHIBIT "F."

4/18/18. Edward L. Gilmore.

Southern Railway System.

Southern Railway Company.
The Cincinnati, New Orleans & Texas Pacific Railway Company.
The Alabama Great Southern Railroad Company.
The New Orleans & Northeastern Railroad Company.
Harriman & Northeastern Railroad Company.
Cincinnati, Burnside & Cumberland River Railway Company.
Northern Alabama Railway Company.

Washington, D. C.,
January 17, 1917.

Executive Order No. 79.

For the purposes of administration the lines of these Companies hereafter — be grouped as follows:

Lines West.

The Cincinnati, New Orleans & Texas Pacific Railway, Alabama Great Southern Railroad, New Orleans & Northeastern Railroad, Harriman & Northeastern Railroad, Cincinnati, Burnside & Cumberland River Railway, Northern Alabama Railway, and the following operating divisions of Southern Railway Company, viz: St. Louis Division, Louisville Division, Memphis Division, Atlanta Division, Columbia Division, Birmingham Division and Mobile Division.

Lines East.

The following operating divisions of Southern Railway Company viz: Washington Division, Danville Division, Charlotte Division, Richmond Division, Norfolk Division, Winston-Salem Division, Columbus Division, Charleston Division, Spartanburg Division, Knoxville Division, Coster Division, Appalachia Division, Asheville Division, Murphy Division, Transylvania Division.

The Executive Officers are as follows:

T. C. Powell, Vice-President, Resident Executive in the West and in charge of Traffic Lines West; Office, Cincinnati, O.

444 H. B. Spencer, Vice-President, in Charge of Construction, Purchases, Real Estate, etc.; Office, Washington, D. C.

E. H. Coapman, Vice-President, in Charge of Operation; Office, Washington, D. C.

H. W. Miller, Vice-President, Resident Executive Officer at Atlanta; Office, Atlanta, Ga.

Lincoln Green, Vice-President, in Charge of Traffic Lines East; Office, Washington, D. C.

FAIRFAX HARRISON, *President.*

445 COMPLAINANT'S EXHIBIT "G."

4/18/18. Edward L. Gilmore.

Excerpt from Minutes of Meeting of the Executive Committee of the Board of Directors of Southern Railway Company Held, Pursuant to Due Notice, at the Office of the Company, No. 120 *Broadway, New York, N. Y., on Tuesday, January* 16, 1917.

"The President presented a plan for reorganization of the Operating and Traffic Departments of the Company, as outlined in proposed Executive Orders Nos. 79 and 80, and in proposed circulars of the Operating and Traffic Departments, which were thereupon submitted to the Committee and of which copies were ordered to be, and are, annexed to the minutes of this meeting. The Committee considered and approved the said plan, and referred to the President the question of adjustment of salaries of any officers whose duties and responsibilities will be affected, with power to make such adjustments in such salaries as he considers necessary or desirable and to make report thereof to the Committee or the Board."

Excerpt from Minutes of Meeting of the Board of Directors of Southern Railway Company Held, Pursuant to Due Notice, at the Office of the Company, No. 120 *Broadway, New York, N. Y., on Tuesday, January* 16, 1918, *at Which Meeting a Quorum of the Board Was Present and Voted.*

"The action taken by the Executive Committee of the Board of Directors at meeting held on January 16, 1917, at twelve o'clock noon, was reported and approved."

A true copy.
Attest:
[SEAL.] (Signed) —— ——, *Secretary.*

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LARGE

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46 COMPLAINANT'S EXHIBIT "H."

4/18/18. Edward L. Gilmore.

xcerpt from Minutes of Meeting of the Executive Committee of the Board of Directors of The Cincinnati, New Orleans and Texas Pacific Railway Company Held, Pursuant to Due Notice, at the Office of the Company, No. 120 *Broadway, New York, N. Y., on Wednesday, January* 17, 1917.

"The President explained to the Committee the plan for the redjustment of the operating and traffic organization for the administration of certain lines of railroad as the Southern Railway System, ncluding the Cincinnati Southern Railway, as set forth in proposed xecutive Order No. 79, which was thereupon submitted to the Comnittee and of which a copy is annexed to the minutes of this meeting. he Committee considered and approved the said plan, and on moion by Mr. Murray, duly seconded, the following additional officers vere appointed to hold office during the pleasure of the Board:

H. B. Spencer to be Vice-President.
E. H. Coapman to be Vice-President.
H. W. Miller to be Vice-President.

Excerpt from Minutes of Meeting of the Board of Directors of The Cincinnati, New Orleans and Texas Pacific Railway Company Held, Pursuant to Due Notice, at the Office of the Company, Ingalls Building, Cincinnati, Ohio, on Thursday, May 17, 1917, *at Which Meeting a Quorum of the Board Was Present and Voted.*

"The minutes of the meeting of the Executive Committee of the Board of Directors held on January 17, 1917, and February 8, 1917, vere read and the action taken at said meetings was approved."

A true copy.
Attest:
[SEAL.] (Signed) —— ——, *Secretary.*

(Here follow diagrams marked pages 447 to 452, inclusive.)

453 DEFENDANTS' EXHIBIT NO. 7.

3/22/18. Edward L. Gilmore.

State of Tennessee.

Department of State.

To all — whom these presents shall come, Greeting:

I, Ike B. Stevens, Secretary of State of the State of Tennessee, do hereby certify that the annexed is a true copy of "Chapter I of the Private Acts of Tennessee—1845-6."—the original of which is now on file and a matter of record in this office. In the Private Acts of Tennessee. 1845-6.

In Testimony Whereof, I have hereunto subscribed my Official Signature and by order of the Governor affixed the Great Seal of the State of Tennessee at the Department in the City of Nashville, this 8th day of March, A. D. 1918.

[SEAL.] (Signed) IKE B. STEVENS,
Secretary of State.

Private Acts of Tennessee of 1845-6.

Chapter 1.

An Act to Incorporate the Nashville and Chattanooga R. R. Co.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That for the purpose of establishing a communication, by railroad, between Nashville and Chattanooga, the formation of a Company is hereby authorized, which, when formed, shall be a body corporate by the name and style of "The Nashville and Chattanooga Railroad Company," and by said corporate name shall be capable in law to buy, receive by gift, hold sell and convey real and personal estate, as hereinafter provided, make contracts, sue and be sued, to make by-laws and to do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated, and to have and use a common seal, and the same to alter and destroy at its pleasure and shall
454 have perpetual succession of members.

Section 2. Books for subscription of sixty thousand shares of the Capital stock of said Company, of twenty five dollars each, shall be opened on the First Monday in January 1846, and shall be kept open for six days, between the hours of ten o'clock in the morning and four o'clock in the evening of each of those days, at the following places, and by the following commissioners to wit:

At Nashville by James Overton, John M. Hill, George W. Martin, Thomas Washington, John Shelby, Godfrey M. Fogg, John W. Walker, Jacob McGavock, J. Hugh Smith, W. W. Woodfolk, A. W.

Venleer, Samuel Watkins, Thomas Wells, John Thompson, Joseph B. Knowles, James Erwin, Felix R. Raines, Pleasant Smith, J. J. Gill, John Nichol, West H. Humphreys, R. J. Meigs, A. V. S. Lindsley, Alexander Allison and Robert I. Moore.

At Gallatin by James A. Blackmore, Elijah Boddie, Henry B. Vaughn, Daniel S. Donaldson, S. R. Anderson, and William M. Blackmore.

At Shelbyville, by Robert Matthews, George Davidson, Thos. Dean, John Eakin and W. C. Swanson.

At Gainesboro, by Thomas L. Bransford, Watson M. Cooke, Samuel E. Hare, and Richard P. Brooke.

At Lebanon, by Paulding Anderson, R. L. Caruthers and Calvin Jackson.

At McMinnville, by George R. Smart, William Black, Jesse Locke, Philip Hoodenpyle and L. D. Mercer.

At Franklin, by Thomas Parks, William Park, Nicholas Perkins, Samuel Crockett, and Robert C. Foster.

At Murfreesboro, by Charles Ready, Edwin A. Keeble, Marman Spence, Lewis Garner, and L. H. Carney.

At Sparta, by James Snodgrass, John Warren and William M. Young.

At Fayetteville, by John Clark, Jr., John M. Bright, Robert Farquharson, William T. Ross, James Fulton and William Bonner.

At Pulaski, by Andrew M. Ballentine, Thomas Martin, and Benjamin Carter.

At Winchester, by Benjamin Deckard, Mark Hutchins, James Harris, James Sharp, Thomas Wilson and C. C. Garner.

At Chattanooga, by Robert M. Hooke, Benjamin Chand-
455 ler, and John P. Long.

At Jasper, by Jackson Pryor, Daniel R. Rawlings and John Herriford.

At Lewisburg, by Benjamin William, Ephraim Hunter, Jas. V. Ewing, Morgan Fitspatrick and Henry Hardin.

Section 3. The said Commissioners, or a majority of them, at each of the places aforesaid, shall receive subscriptions for stock in the said Railroad Company during the time the said books are directed to be kept open, and on each share so subscribed shall demand and receive the sum of fifty cents, without which the subscription shall be void.

Section 4. As soon as the time for receiving subscriptions as aforesaid shall have expired, the said Commissioners shall respectively deposit all the money so received by them in some incorporated Bank redeeming its notes in specie, to the credit of the Nashville and Chattanooga Railroad Company, and subject to the order of the President of the Board of Commissioners hereinafter appointed, and shall also forward a correct list of all the subscribers to the said stock, with the number of shares each subscriber has taken, to a Board of Commissioners to be composed of the following persons: John M. Bass, John M. Hill, Francis B. Fogg, Andrew Ewing, A. O. P. Nicholson, V. K. Stevenson, John Bell, Willoughby Williams, William Nichol, S. D. Morgan, Joseph T. Elliston, Joseph W.

Horton, James A. Porter, James Overton, and John Shelby who may establish rules to govern their proceedings, choose their own President and appoint such other officers and agents, as they may think proper, and prescribe their duties, and who, or a majority of whom, shall meet at Nashville on the Third Monday in January next—ascertain the whole number of shares taken in the said Company, and publish the same in some newspaper printed in Nashville on or before the fourth Monday in January next; and if the number of four thousand shares shall have been subscribed, on each of which there shall have been paid the sum of fifty cents, the Nashville and Chattanooga Railroad Company, shall be regarded as formed, and thenceforth and from the day of the closing of the books of subscription as foresaid the said subscribers to the stock shall form a
456 body politic and corporate in deed and in law, by the name
and for the purpose aforesaid, and in all things to be represented by the Board of Commissioners aforesaid until the election of a Board of Directors as hereinafter prescribed.

Section 5. If on closing the books aforesaid, the number of four thousand shares shall not have been subscribed, then and in that case the said Board of Commissioners, by themselves or their agents, may receive subscriptions till the number of four thousand shares be taken, and whenever that number of shares shall be subscribed, the Company shall be considered as formed, as having a corporate existence as aforesaid, and of which notice shall be given as hereinbefore directed, and may proceed to survey the route for the road and make *and* estimate of the cost of its construction. Nevertheless, no conclusive and binding location of the road shall be made by the Board of Commissioners, but the same be left to the determination of the First Board of Directors chosen by the Stockholders. And the said Board of Commissioners may by themselves or their agents, at such times and places as they may think proper, and upon such terms as to time and manner of payment as they may deem expedient, receive additional subscriptions until the number of forty thousand shares shall have been subscribed, upon which the Company may be formed and the subscribers shall thenceforth form a body corporate as aforesaid; Provided, The same shall be done on or before the first day of January, 1848; and for the residue of the original number of sixty thousand shares, the said corporation when organized, may in like manner, receive additional subscriptions.

Section 6. In case more than sixty thousand shares shall have been subscribed on closing the books when they are first opened, the shares shall be reduced to that number by deducting the surplus shares from the highest subscribers; placing them on equality of numbers as far as can be done; and after such reduction, the holders of the remaining shares shall form the Company and be interested therein in proportion to the number of shares which they may then respectively hold.

457 Section 7. If, on closing the books on the first day of January, eighteen hundred and forty-eight, the number of forty thousand shares shall not have been subscribed, the money paid by each subscriber shall be returned to him by the said Board of Com-

missioners, after defraying the expenses of opening the books, and of making a survey and map of the route and estimate of the cost of the road, which the said Commissioners are hereby authorized to have made as soon as practicable.

Section 8. The affairs of said Company shall be managed by a Board of Directors to consist of fifteen, who shall be chosen by the stockholders from their own body, and a president of the Company shall be elected by the Directors from among their own members, in such manner as the regulations of the corporation shall prescribe.

Section 9. As soon as the number of forty thousand shares shall have been subscribed it shall be the duty of the Commissioners appointed to declare the same to appoint a time for the stockholders to meet in Nashville, and give notice thereof by publication in some of the newspapers of Nashville, at which time and place the said stockholders, in person or by proxy, shall proceed to elect the directors of the Company, and to enact all such regulations, rules and by-laws as may be necessary for the government of the corporation, and the transaction of its business. The persons elected directors at this meeting shall serve for such period, not exceeding one year, as the stockholders may direct; and at this meeting the stockholders shall fix on the day and place or places where the subsequent elections of directors shall be held; and such elections shall thenceforth be annually made. But if the day of annual election should pass without any election of directors, the corporation shall not thereby be dissolved, but it shall be lawful on any other day to hold and make such elections in such manner as may be prescribed by a by-law of the corporation.

458 Section 10. The Board of Directors may fill up all vacancies which may occur in it during the period for which their Board shall have been elected; and in the absence of the President may fill his place by electing a President pro tempore.

Section 11. All contracts and agreements authenticated by the President of the Board shall be binding on the Company without seal, or such other mode of authentication may be used as the Company by their by-laws may adopt.

Section 12. The Board of Directors shall not exceed, in their contracts, the amount of the Capital of the Corporation, and of the funds which the Company may have borrowed and placed at the disposal of the Board; and in case they should do so, the President and Directors who may be present at the meeting at which such contract or contracts so exceedings the amount aforesaid shall be made shall be jointly and severally liable for the excess both to the co-tractor or contractors and the corporation; Provided, That any one may discharge himself from such liability by voting against such contract or contracts, and causing such vote to be recorded on the minutes of the Board and giving notice thereof to the next general meeting of the stockholders.

Section 13. After the route of such railroad shall have been accurately surveyed and adopted, and a plat thereof deposited in the office of the Secretary of State, it shall not be lawful for any other railroad to be built, cut or constructed, in any way or manner, or by any authority whatsoever, running laterally within twenty miles of the route so adopted, unless by said Company, or with the consent of the Board of Directors thereof for the time being.

Section 14. The said Company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise and produce over the said Railroad by them to be constructed; Provided, That the charge of transportation or conveyance shall not exceed thirty five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement for every hundred miles, and five cents a mile for every passenger; And Provided, also, That
the said Company may, when they see fit, farm out *of* their
459 rights of transportation on said road, subject to the rates above
mentioned.

Section 15. The Board of Directors may call for the payment of twenty four and a half dollars on each share of stock in sums not exceeding*s* two dollars in every thir-y days; Provided, That twenty days' notice be given of such call in at least one public newspaper of the State in which any of the stockholders may reside; and a failure to pay or secure to be paid according to the rules of the Company, any of the instalments so called, as aforesaid, shall induce a forfeiture of the share or shares on which default shall be so made, and all payments thereon, and the same shall vest in and belong to the Company, and may be restored to the owner or owners by the Board of directors, if they deem proper, on the payment of all arrears on such shares, and legal interest thereon; or the directors may waive the forfeiture after thirty days' default, and sue the stockholders for the instalments due at their discretion.

Section 16. The Stock of said Company may be transferred in such manner and form as may be directed by the by-laws of the said corporation.

Section 17. The said Company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with every thing necessary to give it full operation and effect, either opening — books for new stock, or by selling such new stock, or by borrow*n*ning money on the credit of the Company, and on the mortgage of its charter and works; and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting; and any State, or any citizen corporation or Company of this or any other State or country, may subscribe for and hold stock in said Company, with all the rights and subject to all the liabilities of any other stockholder.

Section 18. The Board of Directors shall once in every year, at least make a full report on the State of the Company and its affairs to a general meeting of the stockholders, and oftener if directed by a by-law, and shall have power to call a general meeting of the stock-
holders when the Board may deem it expedient.

460 Section 19. No person but a citizen of the United States,
and being a bona fide stockholder in his own right of, at least
forty shares, which he shall have held at leas*e* three months previous to his election (except at the first election) shall be President or a

Director of the Company, nor shall any stockholder vote in person or by proxy at any general or other election (except the first) who shall not have held in his own right the shares on which he offers to vote, at least three months previous to such election.

Section 20. Stockholders may vote in person or by proxy, and in the election of directors, and in voting on all questions which come before a meeting of the stockholders, or which may be submitted to the decision of the stockholders in any other manner, to vote shall be taken according to the following scale; The owner of one or two shares shall be entitled to one vote; the owner of not less than three nor more than four shares shall be entitled to two votes; the owner of not less than five nor more than six shares shall be entitled to three votes; the owner of not less than seven nor more than eight shares to four votes; the owner of not less than nine nor more than eleven shares to five votes; the owner of not less than twelve nor more than fifteen shares to six votes; the owner of not less than sixteen nor more than twenty shares to seven votes; the owner of not less than twenty nor more than twenty-six shares to eight votes; the owner of not less than twenty seven shares, nor more than thirty three to nine votes; the owner of not less than thirty four, nor more than forty shares, to ten votes, and the owner of every ten shares above forty shall be entitled therefor to one vote; Provided that no individual corporation or Company shall be entitled to more than five hundred votes.

Section 21. The said Company may purchase have and hold in fee, or for a term of years, any lands, tenements or hereditaments which may be necessary for said road or appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants or agents of the Company, or for workshops or foundaries to be used for the said Company, or for procuring timber, stones or other materials necessary for the construction of the road, or its appurtenances, or for effecting transportation thereon.

461 Section 22. The said Company shall have the right, when necessary to construct the said road, or any branch thereof, across or along any public road or water course; Provided, That the said Road, and the navigation of such watercourse shall not be thereby obstructed; and Provided further, That such Railroad shall not be located so near any turnpike road as to injure or prejudice the interests of the stockholders in such turnpike road, except upon such terms as may be agreed upon by the President and Directors of the same, on behalf of the stockholders.

Section 23. The said Company may purchase, have and hold any bridge or tuenpike road over which it may be necessary to carry the said Railroad; and when such purchase is made to hold the said bridge or turnpike road on the same terms, and with all rights which belong to the individual, individuals or corporation from which such purchase may be made; Provided, That the said Company shall not obstruct any public road without constructing another as convenient as may be.

Section 24. Where any lands or right of way may be required by the said Company for the purpose of constructing their road, and for want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five Commissioners or a majority of them, to be appointed by the Circuit Court of the County where some part of the land or right of way is situated, and the said Commissioners, before they act, shall severally take an oath before some justice of the peace, faithfully and impartially to discharge the duty assigned them. In making the said valuation, the Commissioners shall take into consideration the loss or damage which may occur to the owner or owners in consequence of the land being taken or the right of way surrendered, and also the benefit and advantage he, she or they may receive from the erection or establishment or the Railroad or works, and shall state particularly the nature and amount of each, and the excess of loss and damage over and above the benefit and advantage shall form the measure of valuation of the said land or right of way. The proceedings of the said Commissioners, accompanied with a full description of the said land or right of way, shall be returned, under the hands and seals of a majority of the Commissioners to the Court from which the Commission issued, there to remain of record. In case either party to the proceedings shall appeal from the valuation to the next session of the Court granting the Commission, and give reasonable notice to the opposite party of such appeal, the Court shall order a new valuation to be made by a jury, who shall be charged therewith in the same term, or as soon as practicable, and their verdict shall be final and conclusive between the parties, unless a new trial shall be granted; and the lands or right of way, so valued by the Commissioners or jury, shall vest in the said Company in fee simple, as soon as the valuation may be paid, or when refused, may be tendered. Where there may be an appeal, as aforesaid, from the valuation of Commissioners by either of the parties, the same shall not prevent the work intending to be constructed from proceeding; But where the appeal is by the Company requiring the surrender, thay shall be at liberty to proceed in their works only on condition of giving to the opposite party a bond with good security, to be approved of by the Clerk of the Court where the valuation is returned, in a penalty equal to doub'e the said valuation, condition- for the payment of said valuation and interest in case the same be sustained: and in case it be reversed, for the payment of the valuation thereafter to be made by the Jury and confirmed by the Court. Provided, That when the land cannot be had by gift or purchase, the operations of the work are not to be hindered or delayed during the pendency of any proceeding to assess its value as aforesaid; nor shall any injunction or supersedeas be awarded by any Judge or Court to delay the progress or said work. 462

Section 25. In the absence of any contract with the said Company in relation to lands through which the said road may pass, signed by the owner thereof, or by its agent, or any claimant or person in possession thereor, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space or one hundred feet on each side of the centre of said road has been granted to the Company by the owner thereof, and the said Company shall have good right and title thereto, and shall have, hold and enjoy the same as long 463 as the same be used only for the purposes of the road, and no longer, unless the person or persons owning the said land at the time that part of the road which may be on said land was furnished, or those claiming under him, her or them shall apply for *as* assessment for the value of the said lands, as hereinbefore directed, within five years next after that part of said road was finished.

And in case the said owner or owners, or those claiming under him, her or them shall not apply for such assessment within five years next after the said part was finished, he, she, or they shall be forever barred from recovering the said land, or having any assessment of compensation therefor; Provided, Nothing herein contained shall effect the rights of femes covert or infants until two years after the removal of their respective disabilities.

Section 26. If any person shall intrude upon the said Railroad, or any part thereof, by any manner of use thereof, or of the rights and privileges connected therewith, without the permission, or contrary to the will of said Company, he, she, *of* they shall forthwith forfeit to the said Company all the vehicles that may be so intruded on said road, and the same may be recovered by suit in law; and the person or persons so intruding may also be indicted for misdemeanor, and upon conviction, fined and imprisoned by any Court of Competent jurisdiction.

Section 27. If any person shall willfully and maliciously destroy or in any manner hurt, damage or obstruct the said Railroad, or any bridge or any vehicle use- for, or in the transportation thereon, such person or persons so offending shall be liable to be indicted therefor, and on conviction shall be imprisoned not more than six nor less than one month, and pay a fine not less than twenty dollars; and shall be further liable to pay all the expenses of repairing the same; and it shall not be competent for any person so offending against the provisions of this clause to defend himself by pleading or giving in evidence that he was the owner, or agent, or servant of the owner of the land and where such destruction, hurt, damage injury or obstruction was done or caused, at the time the same was caused or done.

464 Section 28. Every obstruction to the safe and free passage of vehicles on the said road shall be deemed a public nuisance and may be abated as such by an officer, agent *of* servant of the Company, and the person caus*e*ing such obstruction may be indicted and punished for erecting a public nuisance.

Section 29. The said Company shall have the right to take, at the store houses they may establish or annex to their railroad, all goods, wares, merchandise and produce intended for transportation, prescribe*d* the rules for priority, and charge and receive such just and reasonable compensation for storage as they, by rules, may establish (Which they cause to be published) or as may be fixed by agreement with the owner, which may be distinct from the rates of transportation. Provided, That the said Company shall not charge or receive storage on goods, wares, merchandise or produce which may be delivered to them at their regular depositories for immediate transportation, and which the Company may have the power of transporting immediately.

Section 30. The profits of the Company, or so much thereof as the Board of Directors may deem advisable, shall when the affairs of the Company will *may* permit, be semi-annually divided among the stockholders in proportion to the stock each may hold.

Section 31. The said Company is hereby expressly prohibited from carrying on any banking operations, but may effect insurance on lives and property transported on the road.

Section 32. Whenever in the construction of said Road, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the Company to construct said road across such established road or way so as not to impede the passage or transportation of persons, or property along the same; or where it shall be necessary to pass through the land of any individual, it shall be their duty to provide for such individual a proper wagon-way or ways across said road from one part of his land to the other.

Section 33. The said Company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work.

465 Section 34. This Charter shall be amendable, from time to time by the Legislature whenever the President and Directors shall unanimously petition for amendments, specifying in the petition the nature of such amendments; and when such amendments shall be adopted by the Legislature and submitted to the Directory, and be accepted *by* adopted unanimously by the President and Directors, they shall be obligatory on the stockholders, and not otherwise.

Section 35. The President, Clerks, Agents, Officers and Servants of said Company shall be exempt from military duty, except in cases of invasion or insurrection, and shall also be exempt from serving on juries, and working on public roads.

Section 36. The Company shall have full power and authority to purchase and own such number of slaves as may be necessary for the construction of the said Road and for keeping the same in repair.

Section 37. If by decree or otherwise the said corporation shall be dissolved, the President and Directors of said Company are created Trustees with such powers only as may be necessary to collect the debts due the Company, preserve the property pay the debts, and distribute the property and effects of the Company to those who may be entitled thereto under the Charter.

Section 38. The Capital Stock of said Company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer.

Section 39. The Railroad Authorized by this Act shall be commenced within three years after the passage of this Act, and shall be finished within six years thereafter, otherwise the Charter hereby granted shall be void.

Section 40. Any individual or individuals, Company or body corporate with permission of the Legislature of this State may hereafter construct branches to unite with the said Nashville and Chattanooga Railroad; and it shall be the duty of said Company, when required, to receive on their road the full loaded freight-cars from such branches and transport the same to their destination and to return them, without changing the loads thereof, or charging for the transportation of the goods, wares, merchandise and produce therein, 466 any greater rate of freight than they charge for similar goods, wares, merchandise and produce in their own cars. Provided, that the Company shall not be *impelled* to receive such cars on their roads, unless they are constructed in the same manner, and are of equal strength with their own cars, of which the engineer of the main road shall be the Judge: And Provided, That the Company shall not be required to receive any car from such branches without receiving payment for at least twenty miles transportation; And Provided, also, That the said Company shall be entitled in all respects to similar and equal privileges on any branches constructed to unite with their road, subject to the same restraints.

BROOKINS CAMPBELL,
Speaker of the House of Representatives.
H. M. WATTERSON,
Speaker of the Senate.

Passed December 11, 1845.

Endorsed: State of Tennessee. Certified Copy of "Chapter I. of the Private Acts of Tennessee—14506. By Ike B. Stevens, Secretary of State.

467 DEFENDANTS' EXHIBIT NO. 8.

3/22/18. Edward L. Gilmore.

State of Tennessee,
Department of State.

3, 9, 1918.

Mr. A. W. Awkers, Dr., to Ike B. Stephens, Secretary of State.

Certified Copy Charter $10.00

Nashville — Chattanooga Railroad Co.

Paid.

IKE B. STEPHENS.
Secretary of State,
Per J. B. BRIGHAM.

Mis. Receipt No. 642.

17—21

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DEFENDANTS' EXHIBIT No. 9.

3/22/18. Edward L. Gilmore.

State of Tennessee,
Department of State.

To all to whom these presents shall come, Greeting:

I, Ike B. Stephens, Secretary of State of the State of Tennessee, do hereby certify that the annexed is a true copy of Chapter III. of the Private Acts, of Tennessee of 1835-6. An Act to incorporate the Hiwassee Railroad Company, the original of which is now on file and a matter of record in this office, in the Private Acts of Tennessee.

In Testimony Whereof, I have hereunto subscribed my Official Signature and by order of the Governor affixed the Great Seal of the State of Tennessee at the Department in the City of Nashville, this 9th day of March, A. D. 1918.

[SEAL.] (Signed) IKE B. STEPHENS,
Secretary of State.

Private Acts of Tennessee of 1835-6.

Chapter III.

An Act to Incorporate the Hiwassee Railroad Company.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That William Park, Solomon D. Jacobs, Ebe*b*ezer Alexander, Wm. B. A. Ramsey, Drury P. Armstrong, of Knoxville; Henry Liggett, Wm. S. M'Ewen, —— Hamilton, Joseph Bird, of Kingston; Fidelio S. Hunt, Hugh Graham, Jas. Dickinson, Joseph Jones, Wm. Houston, of Tazewell; Nicholas Fain, Willie B. Mitchell, and Clinton Armstrong, of Rogersville; William Dickson, George Johnes and Valentine Sevier, of Greenville; John Blair Seth, J. W. Lucky and John G. Eason, of Jonesboro; Robert H. Rynds,
469 John Roper, William Moore and Joseph Hamilton, Jr., of
Dandridge; Macajah C. Rogers, James P. H. Porter, John Cannon, of Sevierville; William Wallace, John Sample, J. H. Gillespie, Wm. A. Spencer, of Maryville; James A. Coffin, James Greenway, Samuel Bicknell, William M. Stakeey and Guilford Cannon, of Madisonville; Matthew Nelson, Jacob Pearson, Robert Cleveland, Hugh Smith and William Montgomery, of Philadelphia; Solomon S. Bogart, Onslow G. Murrell, John W. M. Brazeale, John Crawford and Thomas Crutchfield, of Athens; John L. M'Carthy, Archibald K. Turk, Ezekiel Bates, of Calhoun; John White, Hamilton Bradford, Henry Bradford, of Columbus; John Locke, Richard Waterhouse, Thomas M'Cally, Robert N. Gillispie, of Washington; Samuel L. Story, John Bridgeman and Samuel Robertson, of Pikeville; John

Kelly, James Francis and William Rice, of Jasper; Madison Rawlings, Wm. S. Smith and Samuel Igone, of Dallas; William Grant, William M'Millin and Henry Price, of Bradley County, be, and are hereby appointed Commissioners, under the direction of a majority of whom subscriptions may be received to the Capital stock of the Hiwassee Railroad Company hereby incorporated; which Commissioners together with such other persons as now are or may hereafter become associated with them, their *seccessors* and assigns, shall constitute a body corporate, and they are hereby incorporated under the name aforesaid, and in that name they shall have perpetual succession, may sue and be sued, plead and be impleaded, and shall possess and enjoy all the rights, privileges and immunities, with power to make such by-laws, ordinances, rules and regulations not inconsistent with the laws of this State and the United States, as shall be necessary to the well ordering and conducting the affairs of said Company, and may, by their by-laws, declare vacant the place of any director for non-attendance or neglect of duty; and the said Company shall be capable, in law of purchasing, accepting, selling, leasing and conveying estates real, personal and mixed, to the end and for the purpose of facilitating the intercourse and transportation from Knoxville, East Tennessee, through the Hiwassee District, to a point on the southern bound-ry of Tennessee, to be designated by the Commissioners hereinafter mentioned as the most practicable route to intersect the contemplated Railroad from Augusta to Memphis.

470 Section 2. Be it enacted, That the Capital Stock of said Company shall be six hundred thousand dollars, in shares of One Hundred Dollars each, which shares may be subscribed for by corporations or individuals, but so soon as four thousand shares are subscribed, the subscription shall be binding and the corporate powers of said Company *be* herein granted, shall commence and have as full operation as if the whole of the shares composing the capital stock were subscribed.

Section 3. Be it enacted, That if more than six thousand shares shall be subscribed to the Capital St*co*k, the Commissioners or a majority of them, shall reduce the subscription to six thousand shares by striking off from the highest subscription in succession in such manner that no subscription shall be reduced while one remains larger, estimating by shares instead of dollars, and if there shall be an excess, then lots shall be drawn by the Commissioners to determine who are excluded.

Section 4. Be it enacted, That there shall be paid on each share subscribed, but not until four thousand shares shall have been subscribed, such sum as the President and Directors hereinafter named, or a majority of them, may direct, and in such instalments *nor* exceeding one fourth of the subscriptions in any one year; Provided no payment shall be d*a*manded until at least thirty days' notice shall have been given by the said President and Directors in the Newspapers printed in the towns of Knoxville and Athens, of the time and place of payment; and if any subscriber shall fail or neglect to pay any instalment or part of said subscription thus demanded, for thirty days next after the time it fell due, the stock on which it was demanded, together with the amount paid in, may, by the President and Directors or a majority of them, be declared forfeited, and after due notice, shall be sold at auction for the benefit of the Company, or they may waive the forfeiture after thirty days' default and sue the stockholders for the instalments due, at their discretion.

Section 5. Be it enacted, That if the subscription of four thousand shares herein made necessary for the incorporation of said Company, shall not be obtained by the first day of January 1838, the same and all the subscriptions under it, shall be null and void upon the
471 stockholders paying to Commissioners a sum not exceeding
one dollar on each share, to defray the expenses of opening books.

Section 6. Be it enacted, That on the 4th day of July, 1836, the said Commissioners shall cause books for the subscription of stock to be opened in the town of Knoxville, Tazewell, Rogersville, Jonesboro, Greenville, Dandridge, Sevierville, Maryville, Madisonville, Columbus, Philadelphia, Athens, Calhoun, Washington, Dallas, Jasper, Pikeville, and Kingston, and at such other places as they may deem advisable, which shall continue open for the space of ten days, or until four thousand shares of the capital stock shall have been subscribed; and as soon as it is ascertained that four thousand shares are subscribed, the said Commissioners, or a majority of them, shall give notice by advertisement in the newspapers aforementioned, at least thirty days previous, of the time and place that an election will be held for the election of nine directors to manage the affairs of said Company; and at such time and place, each stockholder may attend in person or vote by proxy for the directors aforesaid, giving one vote for each share of which he may be the owner in that and all succeeding elections; and the directors thus elected shall elect one of their body president of the Board, who shall together with the other directors, continue in office until the first Monday of January ensuing and until their successors are elected and duly qualified; and three of the Commissioners may act as judges of the first election; and none but a stockholder shall be eligible as a President or Director.

Section 7. Be it enacted, That to continue the secession of President and Directors of said Company, nine directors shall be chosen annually on the first Monday in January, at such place as the Board may designate by the stockholders; and the directors shall have power to appoint judges of election. The President of the Board shall be elected within three days after the Board is organized. If any vacancy shall occur by death, resignation or otherwise, the vacancy shall be filled by the Board, and the persons thus appointed shall hold their office until the next annual election. All elections required to be made at a particular time and place, if not then and there made, may be made at any other time or place by
472 giving the usual notice of thirty days, and the old officers
shall continue to exercise their functions until their successors are duly elected and qualified.

Section 8. Be it enacted, That a general meeting of the stockholders shall be held annually at the time and place appointed for the election of President and Directors, at which time and place it shall be the duty of the President and Directors in office to exhibit a clear and detailed statement of the affairs of the Company, and at such meetings a majority of the whole votes upon the stock shall be required to remove an officer, or to reverse decrees or acts of the directory.

Section 9. Be it enacted, That every officer of said Company shall, previous to entering upon the duties of his office, take an oath or affirmation faithfully to discharge his duty according to the provisions of this Act.

Section 10. Be it enacted, That if any of the six thousand shares shall remain unsubscribed for after the organization of said Company, the Board of Directors shall have power to open the books for the sale of the balance of the stock, upon giving thirty days' notice of the time and place, and the subscribers of such stock shall have all the rights and privileges, and be subject to the same regulations of the original share holders.

Section 11. Be it enacted, That said President and Directors shall have power to appoint a cashier and all such officers, engineers, agents or servants whatsoever, deemed necessary for the transaction of the business of the Company, and may remove any of them at pleasure; may fix the salary or compensation of such cashier, engineers, officers or servants, in the employ of said Company; and to determine by their bylaws the manner of adjusting and setting all accounts against the Company, and also the manner, effect and evidence of transfer of stock in said Company.

Section 12. Be it enacted, That if the Capital Stock of said Company shall be found insufficient for the purposes of this Act of incorporation, it shall and may be lawful for the President and Directors or a majority of them, from time to time to increase said Capital Stock by an addition of shares to any amount, so that the whole capital shall not exceed one million five hundred thousand dollars, for which they may cause subscriptions to be received, giving
473 notice in the manner herein before prescribed; the purchasers of which shall stand in the same relation to the Company as the original stockholders.

Section 13. Be it enacted, That the President and Directors of said Company shall, and they are hereby vested with all the powers and rights necessary for the building, constructing, and keeping in repair of a Railroad from Knoxville, East Tennessee, through the Hiwassee district to a point on the southern boundary of Tennessee, on the nearest, best and most practicable route. The said road shall have as many tracks as may be deemed necessary by the Board of Directors, but shall not be more than two hundred feet wide, to which width the Company may purchase and cause the same to be condemned for the use of said road, or any less breadth, at the discretion of the directory; and they may cause to be made, or contract with others for making of said Road or any part thereof; and they or their agents, or those with whom they may contract for making any part of said road, or their agents, may enter upon, use and excavate any lands which may be laid out for the site of said road, or the erection of warehouses, engine arbors, reservoirs, booths, stables, officers' and mechanics' shops, or other works necessary or useful in the construction and repair thereof or its works. They may fix scales and weights, build bridges, lay rails, make embankments and excavations, and may use any earth ground, rock timber or other material which may be wanted for the construction and repair of any part of said road, and may construct and acquire all necessary steam engines, cars, wagons, and carriages, for transportation on said road by horse or steam power, and all necessary apparatus app*ur*taining to the same.

Section 14. Be it enacted, That wherever *is* shall become necessary after said road is laid out, to subject the land of individuals over which said road is laid out, to the use of said Company, and if the right of soil of the owner cannot be had by gift or purchase, it shall be lawful for the President and Directors, their agents, contractors, laborers, and servants to enter upon such lands and proceed in the opening and constructing said Railroad through the same; the pendency of any proceeding in Court, or before 474 arbitrators, assessors or valuers, to estimate the damages that will be sustained by the owner or proprietor of said land by reason of opening said road, shall in no manner hinder or delay the progress of said work, and no order shall be made, nor shall any injunction or supersedeas be awarded by any judge or Court to hinder or delay the progress of said work, the true intent of this act being, that all injury that may be done to any land without the consent of owners or proprietors thereof, by opening and constructing the railroad through the same, over and above the advantages of the road to the owners *of* proprietors of the lands, shall be fully and completely compensated for in damages when ascertained so that a work of great public utility may not be delayed by law suits.

Section 15. Be it enacted, That the President and Directors of said Company, their officers, servants and agents, shall have full power and authority to enter upon all lands and tenements through — they may judge it necessary to make said road, and lay out the same according to their pleasure, so that neither the dwelling house, yard, garden, curtilage, be invaded without consent of the owner or proprietor thereof; and if the Company cannot agree as to the value of the land, and the owner will not convey it in fee, either party may apply to the Circuit Court of the County, where the said land lies, by giving five days' notice, if the owner of the land resides in the County and twenty days' notice if he resides in any other County in this State, and by advertising in some newspaper printed in Knoxville, Athens, or Madisonville, if he resides out of the State, or be a body corporate to appoint Commissioners to assess to value and condemn the land for the use of said road; and the Court shall appoint five disinterested freeholders of said County, and who shall be sworn or affirmed justly and impartially to value the lands who shall ascertain what damage the owner will sustain, if any by the location of said road over his land, always taking into consideration the benefit the road may be of to the owner, and the tendency said road will have to enhance the value of the land; and said five freeholders any three

of whom concurring, shall report to said court as soon as
475 practicable the damages, if any and if none are sustained,
they shall report the fact; which report, if unaccepted to, shall be recorded and if any damages are assessed, the money shall be paid into — Court by the Company.

The fee simple of land so valued as aforesaid, shall vest in said Company; and the description of the land and the report of the Commissioners, shall be made a matter of record, and when registered, shall have the effect of a deed of conveyance in fee simple to the Company; Provided, however, that when infants or persons non-compos are owners of the lands, the guardian shall be notified of said proceedings in court, and if there be no regular guardian, said Court shall appoint some person well qualified to defend and protect the interest of such infant or non-sane person.

Section 16. Be it enacted, That the President and Directors for the purpose of making said road or repairing the same after it shall have been made, shall be at liberty, by themselves or agents, to enter upon an adjacent land, and cut quarry, dig, take and carry away therefrom any timber, stone gravel *of* earth, which may be necessary; Provided, that they shall not, without the consent of the owner, cut down any fruit tree *of* trees preserved in any enclosure for shade or ornament, or take away any material constituting any part of a fence or building.

For all which material, under the authority of this Act, and for all incidental injuries done to ground, wood, enclosure, or crops, in carrying them away, the said Company shall make to the owner a reasonable compensation, and if the parties cannot agree upon the price, it shall be ascertained by three impartial freeholders, to be appointed by a justice of the peace at the application of either party, the opposite party having three days' notice of the application to the justice. The three freeholders shall be sworn to do impartial justice between the parties; their award shall be returned to the justice, and shall stand as an award made by order of Court upon the rights of the parties; upon which the justice may enter judgment and issue execution if within his jurisdiction, if over he shall certify the proceedings as in other cases to the next court, to be proceeded upon as an award made by order of said court; Provided either party may
have the proceedings corrected by certiorari, and not by
476 appeal; if the proceedings be quashed, the court may appoint
other valuers, and cause justice to be done as contemplated, before and by order of the Court, quashing said proceedings.

Section 17. Be it enacted, That should said railroad pass over vacant and unappropriated lands, said Company shall have the exclusive right of entering the land over which said road may be laid out, not exceeding two hundred feet in breadth, until the first day of January, 1839; and the entry taker of the district or county through which said road may be laid out, shall not receive any entry within that period for the benefit of any other person or persons than said Company; under the penalty of five thousand Dollars, to be recovered by action of debt in any Court having cognizance thereof, at the suit of said corporation; Provided said Company shall notify the entry of the different counties through which said road may pass, of the route thereof.

Section 18. Be it enacted, That said Railroad Company shall have power to acquire and own as common stock of said Company, lands near and connected with said road, on which to erect warehouses, booths, arbors, stables, reservoirs, etc., for the purpose of constructing said road and keeping it in repair, and for the convenience of transportation and places of deposit which improvements they are hereby authorized to construct.

If the Company cannot agree with the owners of the land necessary for the above purposes, they may have it condemned in the same manner as the land over which the road is laid out may be condemned by the 15th Section of this Act; Provided, that *nor* more than *five* acres shall be taken at any one place, except by agreement with the owners.

Section 19. Be it enacted, That the whole stock and property of said Company, real personal and mixed, and the issues, profits, and proceeds thereof, shall be holden in law, and are hereby declared to be personal property; and the same shall be governed by the rules and laws governing personal property in all cases, and the said Property and the profits arising therefrom, shall be vested in the respective shareholders, their heirs, and executors, administrators, and assigns, in the proportion of their respective shares forever.

477 Section 20. Be it enacted, That whenever it shall become necessary in the construction of said road to cross or intersect any public road now or hereafter established by law, it shall be the duty of said Company so to construct said road, as not to impede the passage *of* transportation of persons or property along the same.

Section 21. Be it enacted, That when it shall be necessary to pass through the improved land of any individual, it shall be the duty of said Company to provide such individual with a proper and suitable wagon way across said road from one part of his or her land to the other; if the same shall be required by said owner, at the time the route of said railroad (is) determined on, but the owner of such land may at any time after said Railroad shall be opened and completed, construct and make such wagon way across the same at his or her own expense, under the supervision and direction of said Company.

Section 22. Be it enacted, That if said Company shall not begin the Railroad contemplated by this Act or contract, for the construction of some part thereof, on or before the first day of January, 1838, and complete the same on or before the first day of January 1844, the interest of said Company in said road shall be forfeited and cease, and also all right to take tolls.

Section 23. Be it enacted, That as soon as any section of five miles of said road shall be completed, the President and Directors may transport all persons, produce and commodities, such person or persons, or owners of such produce or commodities, first paying to said Company or their agent the toll that may be demanded for the purpose. The capital stock of said Company shall be forever exempt from taxation, and all their other property of every description situated within this State, including the road and rails, shall be exempt from taxation for and during the period of twenty years from the completion of said road and no longer.

Section 24. Be it enacted, That after said Railroad shall be completed, or any five miles thereof, the President and Directors shall, on the first Monday in January and July in each and every year, declare and make dividends of net profits, or the tolls, herein granted, as may be advisable to be divided among the proprietors.

478 Section 25. Be it enacted, That if any person shall wilfully injure, impair, or destroy any part of said road constructed under this Act, or any of the necessary work, building, machines, wagons, cars, booths, reservoirs, bridges or viaducts, such persons shall be subject to indictment, and on conviction, shall be fined and imprisioned at the discretion of the Court and Jury, and shall moreover be liable to an action of damages at the suit of said Company in any court having co*n*nizance thereof.

Section 26. Be it enacted, That said Company shall be authorized to charge the following tolls, to wit: for every passenger with not exceeding one hundred pounds of baggage, not exceeding six cents per mile; for every one hundred pounds of goods, wares, merchandise or produce and commodities of every description, not exceedings one half cent per mile on heavy articles; and ten cents per cubic foot on articles of measurement.

Section 27. Be it enacted, That full right and privilege is hereby reserved to the Citizens of this State, *of* any Company hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for any other railroad or public improvement; Provided no injury is done to the works made and created by said Company hereby incorporated; and provided also that the same shall not interfere with the privileges hereinbefore granted.

Section 28. Be it enacted, That if an amount of stock should not be subscribed sufficient to complete the whole work from Knoxville to the South bound-ry line of this State, as contemplated by this Act, or if a majority of the Board of Directors should deem it advisable or expedient to begin the work at some point on Big Tennessee River, and should complete the road from such point to the South bound-ry line of the State of Tennessee, the work may be con*dis*ered as completed; *and* thing in this Act to the contrary notwithstanding. But the Board of Directors may in their discretion, continue said road to Knoxville, should they begin the work at some other point.

EPHRAIM H. FOSTER,
Speaker of the House of Representatives.
JONATHAN WEBSTER,
Speaker of the Senate.

479 DEFENDANTS' EXHIBIT No. 10.

3/22/18. Edward L. Gilmore.

STATE OF GEORGIA,
Fulton County:

Whereas, the undersigned, John B. Gordon, the Governor of said State, did, in strict compliance with the Act of the General Assembly of said State, entitled, "An Act to provide for the lease of the Western & Atlantic Railroad, to define the rights, powers, liability, and duty of the lessee, and for other purposes, therewith connected", which Act was approved November 12, 1889, ma*d*e an advertisement, which was a defin*a*te proposal for bids, as auth*i*rized by said Act, for the lease of the said the Western & Atlantic Railroad, together with all its houses, workshops, rolling stock, depots, and appurtenances of every kind and character, being the property of said State, and which said Act authorizes the Governor of said State to lease as herein provided, said bids to *t*be submitted in writing *to be submitted in writing* to said Governor on or before the twenty-seventh (27th) day of June, eighteen hundred and ninety (1890); and whereas, on or before the said last named date two bids only were so submitted, one of which was by the Nashville, Chattanooga & St. Louis Railway, a corporation created by the laws of the State of Tennessee, but not a corporation created by the laws of the State of Georgia, proposing and offering to lease the said Western & Atlantic Railroad and the other property hereinbefore mentioned under and in accordance with the provisions of said Act, approved, as aforesaid, on the twelfth (12th) day of November, eighteen hundred and eighty-nine (1889); for a term of twenty-nine (29) years, and to pay therefor the sum of thirty-five thousand and *and* one dollars $35,001.00 each month during said term as required by said Act; and whereas, after the said Governor had given due notice of the time and place of the opening and examination of the bids, in strict conformity to the requirements 480 of said Act, the Governor, Comptroller General, Secretary of State, Treasurer, and Attorney General of said State opened and examined said bids at the time and place so designated, in the presence of the public and the bidders, or their legal representatives, to-wit, at eleven (11) o'clock in the forenoon of the twenty-eighth (28th) day of June, eighteen hundred and ninety (1890), at the Capitol, in the city of Atlanta, Georgia, and then adjourned over until the following Monday, to-wit, until the thirtieth (30th) day of June, eighteen hundred and ninety (1890), at four (4) o'clock in the afternoon, and then assembled again, and then and there, at the said capitol of the State of Georgia, at 4 o'clock in the afternoon on the said thirtieth (30th) day of June eighteen hundred and ninety (1890), did formally and in writing accept the said bid of the said the Nashville, Chattanooga & St. Louis Railway, which written acceptance was, on the same day, ordered by the

Governor to be entered on the minutes of the Executive Department, together with both of the bids submitted as aforesaid, and the papers accompanying said bids, and was, together with accompanying papers as aforesaid, entered on the minutes in said Department, in pursuance of said order. And whereas, prior to the opening of said bids, the Governor appointed three expert railroad men, to-wit, Eben Hillyer, W. L. Clark and John Screven, not connected with the lease company between which — the said State of Georgia a lease of said railroad and other property connected therewith now exists, or with any corporation having shares in said lease, who did, within ten days prior to the opening of said bids, examine the road-bed of the said the Western & Atlantic Railroad and its appurtenances, and made a full and complete report of the condition of the same to the Governor, as required by the first clause or sentence of the tenth Section of said Act, which report was filed, in accordance with said Section, in the office of the Secretary of State, on the twenty-sixth (26th) day of June, eighteen hundred and ninety (1890), and is taken by the parties hereto as showing the true condi*d*tion of sai*d* railroad
481 and the appurtenances thereof, which are mentioned and the condition of which is stated in said report, at the time the said report was filed as aforesaid:

Now, this indenture, made and entered into on this the nineteenth (19th) day of July, eighteen hundred and ninety (1890) between the said John B. Gordon, Governor of the said State of Georgia, and for and in behalf of said State, as party of the first part, and the said the Nashville, Chattanooga & St. Louis Railway, a corporation as aforesaid, as party of the second part, witnesseth: That the said party of the first part, under and by authority of the said Act, approved November twe*n*fth (12th), eighteen hundred and eighty-nine (1889), and in pursuance thereof, in consideration of the premises, and especially of the agreement of the party of the second part to pay into the treasury of the said State, in the city of Atlanta, Georgia, the sum of thirty-five thousand and one dollars ($35,001.) monthly, as required by said Act, and of the deposit with the Treasurer of said State recognized valid bonds of the State of Georgia of the par value of five hundred thousand dollars ($500,000.), as required by said Act, and particularly by the fourth and fifth Sections thereof, as well as in consideration of all the other obligations and duties to be performed under the provisions of said Act by the said party of the second part, does hereby lease to the said party of the second part, viz., to the Nashville, Chattanooga & St. Louis Railway, the said the Western & Atlantic Railroad, (a railroad running from the City of Atlanta, in the State of Georgia, to the city of Chattanooga, in the State of Tennessee), to-gether with all its houses, workshops, rolling-stock, depots and appurtenances of every kind and characte*d*, being the property of the State of Georgia, and which the said Act authorizes the Governor of said State to lease under the provisions thereof, for a term of twenty-nine (29) years, beginning from and immediately after the termination of the lease contract now existing, (which was executed on the twenty-seventh (27th) day of

December, eighteen hundred and seventy (1870), and ends twenty
(20) years from that date). Said lease is made to the said
482 party of the second part with all the rights, powers, and privileges conferred on said lessee by said Act, approved November twelfth (12th), eighteen hundred and eighty-nine (1889), and subject to all the requirements, obligations, and duties thereby exacted of said lessee, and which the said party of the second part hereby agrees faithfully to perform in accordance with the provisions of said Act; the said party of the second part also specially agrees to pay into the treasury of the said State of Georgia each month during the continuance of said lease the sum of thirty-five thousand and one dollars ($35,001) in gold, or its equivalent, as required by said Act.

It is further stipulated and agreed by the parties hereto that this lease is made by the said party of the first part, and accepted by the said party of the second part, under and subject to all the provisions of the said Act of the General Assembly, approved, as aforesaid, on the twelfth (12th) day of November, eighteen hundred and eighty-nine (1889), and that both parties hereto, and all persons or corporations who are, or shall be, their lawful successors by virtue of said Act, are, and shall be, bound in every particular by the provisions of said Act and that if said Act conflicts, in any respect, with this contract, said Act is to govern and control.

In witness whereof the said John B. Gordon, Governor of the State of Georgia, has hereunto attached his official signature and the great seal of said State; and the said the Nashville, Chattanooga & St. Louis Railway, has, by its President, John W. Thomas, (who is authorized by said corporation so to do), signed and executed this contract and attached the corporate seal of said corporation, on the said nineteenth (19th) day of July, A. D. eighteen hundred and ninety (1890).

Executed in duplicate in presence of

J. B. GORDON, *Governor.*

PHILIP COOK,
Secretary of State.

THE NASHVILLE, CHATTANOOGA &
ST. LOUIS RY.,
By J. W. THOMAS, *President.*

J. H. AMBROSE, *Secretary.*

483 **DEFENDANTS' EXHIBIT NO. 11.**

3/22/18. Edward L. Gilmore.

Lease Contract, Western & Atlantic Railroad, December 27, 1919, *to December* 27, 1969.

STATE OF GEORGIA,
County of Fulton:

Whereas, By an Act of the General Assembly of the State of Georgia, entitled "An Act to provide for the leasing or other disposition of the Western & Atlantic Railroad and its properties; for the creation of a Commission to effectuate such purpose, and to define its powers and duties; making an appropriation for the costs of the work required, and for other purposes," approved November 30, 1915, and the Acts ammendatory thereof and supplemental thereto approved August 4, 1916, and August 19, 1916, respectively, there was created a Commission to be known as the Western & Atlantic Railroad Commission, which Commission was by the provision- of said Acts authorized and empowered to lease and contract for the leasing of the railroad properties known as the Western & Atlantic Railroad, including the terminals thereof and its property other than its railroad property not connected with either of its terminals; and was further authorized and empowered to fix and determine all the terms and conditions upon which the said property should be leased, except as limited by the provisions of said Acts, and was further authorized and empowered to agree upon all the terms and details of a formal lease contract, which upon being prepared and certified to the Governor by the said Commission should be executed by him in behalf of the State;

And Whereas, The said Commission, organized in pursuance of the provisions of said Acts, has, in regular meeting assembled 484 by a unanimous resolution agreed to lease said property to The Nashville, Chattanooga & St. Louis Railway, a corporation duly organized and existing under the laws of the State of Tennessee, with its principal office at Nashville, Tenn., under the terms and conditions hereinafter set forth; which resolution, together with all the terms and details of this lease contract, has been certified to the Governor of the State of Georgia by the said Commission;

And Whereas, It is further provided in said Acts that when said lease contract shall have been so prepared and certified to the Governor, the same shall be executed by him in behalf of the State of Georgia.

Now Therefore this Indenture, Made and entered into on this 11th day of May in the year of our Lord One Thousand Nine Hundred and Seventeen, by and between the said State of Georgia, as represented by Nathaniel E. Harris, Governor of the State, for and in behalf of the said State, as party of the first part, and the said

The Nashville, Chattanooga & St. Louis Railway, a corporation as aforesaid, as party of the second part, Witnesseth:

First. The said party of the first part, under and by authority of the said Act approved November 30, 1915, and the Acts amendatory thereof and supplemental thereto, approved August 4, 1916, and August 19, 1916, respectively, and in pursuance thereof, and of the said resolution of the said Western & Atlantic Railroad Commission, in consideration of the premises and of the conditions, covenants and stipulations herein set forth, does hereby lease, for the term of fifty (50) years beginning from and immediately at the termination of the lease contract now existing (which will terminate on the 27th day of December, 1919), and ending on December 27, 1969, to the said party of the second part, viz: to The Nashville, Chattanooga & St. Louis Railway, the said Western & Atlantic Railroad, a railroad running from the City of Atlanta, in the State of Georgia, to the City of Chattanooga, in the State of Tennessee, including the terminals thereof, and its property other than its railroad property 485 not connected with either of its terminals, together with all its houses, workshops, rolling stock, depots and appurtenances of every kind and character, belonging and appertaining to said railroad, except the following pieces or parcels of land, to-wit: Those certain lots *of* parcels of property lying and being in the City of Chattanooga, Hamilton County, Tennessee, described as follows, to-wit:

(*a*) That tract or parcel of land bounded by Market Street, Georgia Avenue and Tenth Street, upon which there is situated a four story brick building now occupied by the Southern Express Company.

(*b*) That tract or parcel of land situated at the corner of Market and Eleventh Streets upon which is situated a four*t* story brick hotel building, now known as the Eastern Hotel.

All being the property of the State of Georgia, and which the said Acts of the General Assembly of Georgia hereinbefore mentioned authorized the Western & Atlantic Railroad Commission by resolution to lease, and which further empowered and authorized the Governor of said State, when such resolution was *cre*tified to him, to execute the lease contract on behalf of the State of Georgia.

Second. Subject to and in accordance with the terms, limitations and provisions of this contract of lease and of the several Acts of the General Assemble authorizing the same, and the party of the first part covenants the quiet and peaceable possession and enjoyment of all the property herein leased to the party of the second part, as against any acts that may be done by or under the authority of the State of Georgia.

Third. It is stipulated and agreed that said lease is made to said party of the second part, with all the rights, powers, and privileges conferred on it by said Act approved November 30, 1915, and the Acts amendatory thereof and supplemental thereto approved August 4, 1916, and August 19, 1916, respectively, and subject to all the requirements, obligations and duties thereby required of it, all of which provisions the said party of the second part hereby agrees faithfully to perform.

Fourth. The said party of the second part agrees and binds
486 itself to pay into the treasury of the said State of Georgia
in advance, on the first day of each and every month during the period of the lease, the sum of Forty Five Thousand (45,000) Dollars, and further agrees to deposit with the Treasurer of the State of Georgia, recognized valid bonds of the State of Georgia, or of the United States, of the par value of Six Hundred Thousand (600,000) Dollars, which deposit shall be subject to the requirements and provisions of Sections Nine (9) and Ten (10) of the said Act approved November 30, 1915. The party of the second part, through any person authorized by it, shall have access to said bonds for the purpose of clipping the coupons thereof in order to collect the interest on said bonds.

Fifth. The party of the second part agrees that it will at all times during the continuance of this lease keep and maintain said railroad including all of its structures, rolling stock, equipment and appurtenances used in connection therewith, including rolling stock and equipment added to the property of the State under Section Six (6) of this contract, in a condition at least equal to that of first-class railroads within the State of Georgia and adequately adapted efficiently, safety expeditiously to serve the public as a common carrier in the transportation of freights and passengers.

Sixth. It is further agreed as a part of the consideration of this contract of lease, that in addition to and exclusive of such expenditures as may be required for the proper repair and maintenance of said railroad and its properties, the party of the second part shall credit annually to an account called "Additions and Betterments of the Western & Atlantic Railroad," such an amount as will show at the end of any year during the term of the lease that there has been credited thereto an aggregate amount equal to Sixty Thousand (60,000) Dollars, multiplied by the numbers of years the lease has run.

It is agreed and stipulated that there shall be charged to such account only such expenditures as are now classed to be Additions an-Betterments under the rules at present issued by the Interstate Commerce Commission. These expenditures, so charged to the account
of Addition and Betterments of the Western & Atlantic Rail-
487 road, shall continue to be made annually during the entire
period of the lease until and aggregate amount of Three Million (3,000,000) Dollars has been so expended. At the termination of the lease by maturity, or for any other cause prior to maturity, any balance remaining unexpended to the credit of said account, that is, and average of Sixty Thousand (60,000) Dollars per year during the time the lease has run when terminated, shall be paid over to the State of Georgia. All additions and betterments so made and charged against such account shall be and become the property of the State of Georgia, and subject to the provisions of this

lease, without abatement, deduction or offset of any kind or character whatsoever.

The expenditures above referred to, subject to the definition and limitation above expressed, shall be made by the party of the second part as and when deemed by it expedient and desirable. The party of the second part shall annually, on or before the 20th day of January in each and every year, prepare and file with the Railroad Commission of Georgia, or such other authority as the State may hereafter designate, a statement showing in detail the character and extent of the improvements, betterments and additions claimed to have been made by the party of the second part during the preceding calendar year ended December 31, which statement shall show the specific character of each expenditure and the amount thereof for which credit is claimed by the party of the second part. The said Railroad Commission of Georgia or other designated authority, shall examine such statement and account, and if found correct shall endorse approval thereon within sixty (60) days after submission thereof and file the same with the custodian of the records of the Western & Atlantic Railroad. Should the said Railroad Commission of Georgia or other designated authority acting at the time, question the correctness or propriety of any item or charge of the statement or account and should fail to come to an agreement with the party of the second part with respect thereto, the matter in dispute shall be submitted to arbitration in the manner as is now provided by the laws of the State of Georgia in Sections 5030 to 5054, both inclusive, of the Code of Georgia for 1910.

488 Seventh. It is understood and agreed that in making improvements and betterments for the use and operation of the Western & Atlantic Railroad the party of the second part shall, in so far as it properly may, construct and maintain the same upon the property of the State, to the end that the integrity of the Western & Alantic Railroad for the uses of transportation, shall be preserved and facilitated.

Eighth. Whatever additional lands or rights of way may be required for revision or double tracking of the line of road, or for other additional tracks or station grounds, shall be acquired at the cost and expense of the party of the second part, but the title thereto shall be taken in the name of the State of Georgia and the same shall be and become a part of the Western & Atlantic Railroad, and as such subject to all of the terms and conditions of this contract. The party of the first part will give its consent to the revision and double tracking of the line as deemed desirable by the party of the second part, and will co-operate in securing the land necessary therefor at the expense to the said party of the second part, the title thereto to be taken in the name of the State as last above provided.

It is understood and agreed that no radical departure in the route or direction of the line of railroad, nor abandonment *of* discontinuance of any part of the line as now constructed and operated, shall be made or permitted without the previous consent of the Railroad Commission of Georgia in behalf of the State, or other such authority as the State may hereafter appoint and designate.

Ninth. It is understood and agreed that the party of the second part shall be exempt, during the entire term of said lease, from the payment of any taxes, of whatsoever nature, on said properties, lying within the State of Georgia, and upon all properties hereafter acquired and charged to the account of "Additions and Betterments of the Western & Atlantic Railroad," as provided in Section Sixth (6th) hereof, and from the payment of any privilege, franchise or other taxes for the operation of said property. But the party of the second part shall pay all tax assessments and governmental charges as may be imposed during the term of said lease by the Government 489 of the United States, and shall be required, and hereby obligates itself to pay on all of that portion of the leased properties covered by this contract, lying within the State of Tennessee, all taxes and assessments that may be legally levied under the laws of said State. But nothing herein shall be construed as exempting from taxation, the rolling stock, equipment or other property owned by the party of the second part and used in connection with the operation of the properties herein leased, all of which shall be subject to taxation as other like property is taxable in the State of Georgia; provided, however, that if such rolling stock, equipment or other property so used in connection with the operation of said leased properties be properly charged at any time to the account of "Additions and Betterments of the Western & Atlantic Railroad," under the provisions set forth in the Sixth (6th) Section of this contract, the same shall thereafter be exempt from taxation by or under authority of the State of Georgia, to the same extent as the properties herein leased and lying within the State of Georgia.

Tenth. The right of the party of the second part to sub-let any part of the property not useful for railroad purposes shall be exercised subject to the terms, conditions, obligations and requirements of the said Acts of the General Assembly and of this contract of lease. No such sub-letting shall extend beyond the term of this lease, whether by expiration of time, forfeiture or other cause; nor shall any such sub-lease confer upon the tenant or sub-lessee any greater or other right to use the property than the party of the second part would have under this contract of lease; nor shall it give rise to any privity of contract as between the sub-lessee and the State; nor introduce a new party to this contract, nor relieve the party of the second part of any duty, obligation or requirement imposed upon it by law or by this contract of lease.

Eleventh. The granting by the party of the second part of trackage rights to other carriers over the Western & Atlantic Railroad or any part thereof, shall not be construed as a sub-letting of the property, such as is forbidden by Section 11-A of the Act without the written consent of the Governor of the State, provided, how- 490 ever, that such use of the tracts and property of the Western & Atlantic Railroad shall always be had and exercised and subsidiary to the domination and control of the party of the second part, and further subject to all the duties, obligations and liabilities of the party of the second part to the State of Georgia, under the

Acts of the General Assembly of Georgia and this contract of lease; and it is further understood and agreed that no contract or agreement for any servient use of the tracts or railway facilities of the Western & Atlantic Railroad, granted by the party of the second part to any other person, shall be construed as introducing a new party to the contract between the party of the second part and the State of Georgia; and every such servient use shall be subject in all respects to this contract of lease, and as between the State and the party of the second part such servient use shall be regarded as being the use by the party of the second part, through its agent or tenant.

Twelfth. There is hereby expressly reserved to the party of the first part the power to suthorize the laying out, building and construction of such ways, streets, roads, bridges, or viaducts across or along the properties leased as may be deemed to be to the interest of the people of Georgia, without let or hindrance, and without liability over to the party of the second part by abatement of lease money or otherwise, as is provided in Section 11-B of the said lease Act, approved November 30, 1915.

Thirteenth. At the expiration of the term of said lease the State of Georgia may claim the right of purchasing from the party of the second part any or all property or properties acquired by it during the term of the lease and used for the convenient operation of the Western and Atlantic Railroad, under the following conditions, to-wit:

(1) The State shall give to the party of the second part notice of its desire to acquire such property at least one year before the expiration of the lease, or in the event of an earlier termination of the lease by forfeiture or otherwise, within six months after such termination.

491 (2) If the party of the second part is willing to sell such property to the State, its reasonable value, as defined in paragraph four (4) of this section, at the time the notice of such claim of right to purchase is given to the party of the second part, shall be paid by the State of Georgia, and in the event the parties hereto cannot agree as to such reasonable value, the amount thereof shall be determined by arbitration as now provided by Sections 5030-5054, both inclusive of the Code of Georgia for 1910.

(3) In the event the party of the second part is unwilling to sell any parcel or piece of property which the party of the first part gives notice it desires to purchase, the respective rights of each shall be determined by arbitration under the aforesaid sections of the Code of Georgia. The arbitrators shall first determine whether the party of the second part shall be required to sell said parcel or piece of property, in determining which the arbitrators shall give consideration to the necessity of each party for the use of said property or any portion thereof. Should said arbitrators determine that the party of the second part should not, if unwilling, be required to sell the whole of said parcel or piece or any portion thereof, then said arbitration shall be final as provided in said sections of the Code of Georgia. Should, on the other hand, said arbitrators determine that the party of the second part, though unwilling, be required to sell the whole of said

parcel or piece of property, then said arbitrators shall be authorized to proceed to fix a reasonable value to be paid by the party of the first part. Should said arbitrators determine that the said parcel or piece of property should be divided between the parties hereto, then they shall proceed to assign to each the particular portion thereof which, in their judgment, each should have, and shall also fix the reasonable value of the portion so assigned to the party of the first part.

(4) In no event shall the reasonable value of any property so acquired by or assigned to the party of the first part under the provisions of this Section, be fixed at a greater sum than the cost of such property, including the improvements thereon, to the party of the second part, plus twenty-five (25) percentum thereof.

492 (5) It is further agreed that whenever the party of the second part shall acquire and be prepared to enter upon the use of any property of the character of that contemplated and referred to in this Section, it shall within ninety (90) days thereafter furnish to and file with the Railroad Commission of Georgia, or other authority that may be hereafter designated by the State of Georgia, a statement or report setting out a description of the property, its location, its contemplated use and the purchase price thereof. If the property shall have been acquired upon a consideration other than the payment of money, such consideration, together with the value of the property, shall be stated.

Fourteenth. The right is hereby expressly reserved to the party of the first part to remove and cause to be discontinued any or all encroachments and other adverse uses and occupancies in and upon the right of way or upon other properties of the Western and Atlantic Railroad, or any part thereof, whether maintained under claim of lawful right or otherwise; and to this end the party of the second part hereby consents that the State may withhold delivery of possession, or right of possession to the party of the second part of such parts of the right of way and other properties as may be so adversely used and occupied, until such encroachments and other adverse uses and occupancies shall have been removed or discontinued; and the State of Georgia may, at its option and in such manner as it may deem best, proceed to remove such encroachments, uses and occupancies, acting therein in its own name and behalf as the owner of the property. It is further understood and agreed that the party of the second part will, if and when so requested, join with the State and because a party *of* any proceeding, judicial or otherwise, that may be instituted by and on behalf of the State for the purpose of freeing the right of way and property of the Western and Atlantic Railroad from all adverse uses and occupancies; provided that nothing herein shall be construed as applying to the tenants and licensees of the present lessee.

It is understood and agreed that when such adverse uses and occupancies shall have been removed by judicial proceedings or otherwise the use of the same for the remaining period of the lease
493 shall inure to the benefit of the party of the second part to
the same extent as the other portions of the right of way and

properties herein conveyed shall inure to it under the terms and provisions of this contract.

Fifteenth. Should, during the term of this lease, any building or other structure now upon the property of the party of the first part included in this lease, or any building or other structure hereafter constructed thereon be damaged or destroyed by fire during the term of this lease, the party of the second part binds and obligates itself to restore such building or structure, within a reasonable time, in substantially as good condition as previous to said damage or destruction.

Sixteenth. It is expressly agreed that should any of the terms or conditions in this contract of lease be found to be inconsistent with any of the terms or provisions of the aforementioned Acts of the General Assembly of Georgia authorizing the making of the same, in such event the terms and provisions of the said Acts shall govern and control.

Seventeenth. It is further contracted and agreed that upon the expiration or termination of this lease for any cause, the party of the second part shall account to the party of the first part for the value of the rolling stock, equipment, and other movable property belonging to the Western and Atlantic Railroad, both that originally owned by and received from the State at the beginning of the lease, as well as that to which the ownership of the State may have been acquired by having the cost thereof charged to the account of "Additions and Betterments of the Western and Atlantic Railroad," as provided in the sixth (6th) and ninth (9th) sections hereof.

On such accounting the party of the second part shall pay to the party of the first part the inventoried value of said rolling stock, equipment and movable property received from the State at the beginning of the lease, together with the cost value of all of the rolling stock and equipment acquired during the currency of the lease and becoming the property of the State by being charged to said account of "Additions and Betterments;" or the party of the second part may turn over to the State rolling stock and equipment in suitable condition for efficient use and service, in amount
494 at least equaling in value that of the rolling stock and equipment so received from and acquired for the party of the first part as in this contract contemplated and provided for.

Should the party of the second part prefer and offer to replace the rolling stock and equipment so received from or acquired for the State as herein provided, and the parties should fail to agree upon the value or efficiency of the rolling stock and equipment so offered, the question of such value or efficiency shall be submitted to arbitration in the manner now provided by Sections 5030-5054, both inclusive, of the Code of Georgia for 1910.

In witness whereof, the said Nathaniel E. Harris, as Governor of the State of Georgia, has hereunto attached his official signature and caused to be affixed the great seal of the State of Georgia in behalf of said State, in duplicate, and the said The Nashville, Chattanooga & St. Louis Railway, has, by its President, John Howe Peyton, who is authorized by said corporation so to do, signed and executed this contract and caused to be affixed by its Secretary the corporate seal, also in duplicate, on the day and year above written.

Executed in duplicate in the presence of

N. E. HARRIS,
Governor of the State of Georgia,
In Behalf of the State of Georgia.

PHILIP COOK,
Secretary of State.

(Seal Attached.)

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
By JNO. HOWE PEYTON, *President.*

Attest:
[SEAL.] J. B. HILL,
Asst. Secretary.

W. & A. Railroad Lease.

Order for Record.

Ordered, That the Secretary of State of the State of Georgia do attach the Great Seal of State to the Contract of Lease executed in duplicate this date by which the Western & Atlantic Railroad and other property described and referred to in said lease contract, is leased for a term of Fifty Years to the Nashville, 495
Chattanooga and St. Louis Railway, and that said Lease Contract be recorded upon the Executive Minutes of this State.

This the 11th day of May, 1917.

N. E. HARRIS, *Governor.*

By the Governor:
RAYMONDE STAPLETON,
Secretary Executive Department.

It appearing that on May 11, 1917, The Nashville, Chattanooga & St. Louis Railway has leased from the State of Georgia the Western & Atlantic Railroad and its appurtenances, it is

Ordered, That the name of the Nashville, Chattanooga & St. Louis Railway be entered on the minutes of the Executive Department as the corporation making said lease.

It is further ordered that said lease contract be recorded in the Executive Department.

This May 11, 1917.

N. E. HARRIS, *Governor.*

By the Governor:
RAYMONDE STAPLETON,
Secretary Executive Department.

Resolution of Western & Atlantic Railroad Commission as to Inventory for New Lease and as to Adjustment Under the Lease Expiring December 27, 1919.

Whereas, under Section 6-A of the Act approved November 30th, 1915, providing for the leasing or other disposition of the Western & Atlantic Railroad, this Commission is charged with the duty and vested with authority to make all settlements and adjustments touching the return of the Western & Atlantic Railroad and its
496 appurtenances and property of every kind included in the
present lease at the expiration of the same in accordance with the terms and conditions of the present lease contract, and therefrom and thereafter to make delivery to and take receipt from the new lessee under this Act for all property or properties leased hereunder: and

Whereas, the present lessee, The Nashville, Chattanooga & St. Louis Railway, has entered into an agreement with this Commission under which it becomes the future lessee of this property; and this Commission having been advised by its Counsel that with the consent of the said The Nashville, Chattanooga & St. Louis Railway the time for making a settlement and adjustment with the present lessee may be anticipated and an agreement therefor may be had in so far as concerns the rolling stock, equipment and other personal property received by the said lessee from the State at the beginning of the present lease, and Counsel for the lessee having expressed concurrence in such opinion: Be it therefore

Resolved, that such settlement and adjustment shall be had as follows:

First. This Commission shall inventory and certify to the Governor of the State to be included in the lease beginning December 27th, 1919, the locomotives and cars received by the present lessee from the State at the beginning of the present lease as of the value placed thereon by the State, to-wit, $361,041.00, for which value The Nashville, Chattanooga & St. Louis Railway, as the future lessee, shall receipt to the State and shall give the State credit therefor, to be accounted for at the time and in the *matter* provided in Section 17 of the new lease contract.

Second. With respect to the tools, shop material, office furniture, supplies, and all other personal property, other than the said locomotives and cars, received from the State at the beginning of the lease and accepted by the said Railway as the lessee under date of March 26th, 1891, at the agreed valuation of $33,093.60, the said The Nashville, Chattanooga & St. Louis Railway will agree to make payment *in case* in cash in the amount of said agreed valuation, such payment to be made at the expiration of the present lease: Be it further

497 Resolved, That a certified copy of this resolution be furnished the said The Nashville, Chattanooga & St. Louis Railway, and that its endorsement of approval thereon shall constitute

the agreement between this Commission and the said Railway with respect to the matters above referred to.

The foregoing resolution is hereby accepted and approved, this the 11th day of May, 1917.

THE NASHVILLE, CHATTANOOGA &
ST. LOUIS RAILWAY,
By JNO. HOWE PEYTON, *President.*

Attest:
[SEAL.] J. B. HILL,
Assistant Secretary.

498 DEFENDANTS' EXHIBIT NO. 12.

3/22/18. Edward L. Gilmore.

Memorandum of Agreement Between the Trustees of the Cincinnati Southern Railway and the Cincinnati Railroad Company.

Whereas, The said Trustees have completed that portion of the Cincinnati Southern Railway lying between Cincinnati and Somerset, with and inclined plane at Ludlow, reaching to the Ohio river, and a line of telegraph between the same places, and

Whereas, Said Trustees have power, by virtue of the act under which they are appointed, to rent or lease the right to use and operate such portions of said Railway as may be completed, upon such terms as they may deem best, and

Whereas, Said Trustees deem it their trust, duty, and the interest of Cincinnati to provide for the travel and traffic arising along the completed portion of said Railway, and from its connections, it is agreed as follows:

Article I.

That said Trustees, for the consideration hereinafter stated, hereby give and grant to the said Company a determinable license, with the rights, following, viz:

1. To pass and repass, and have full and free ingress, egress and regress, with its engines, cars, officers, agents and servants, to, over, upon and along the main and side tracks, turn-outs, switches, turntables, water and fuel stations, and all other conveniences, and into and out of the grounds, depots, stations, stables, shops, and other appendages, of said portion of said Railway.
2. To use the line of telegraph as now constructed between the aforesaid points, and the offices, batteries, instruments and 499 other conveniences connected therewith, for commercial and railway business, but subject to the right of said Trustees, their officers and agents, to have their official messages sent over the same free of charge, which the said Company agrees to do.
3. To stretch and maintain additional wires on the posts erected

along said line, between said points, and to establish new offices and facilities for the business passing over the same.

But all the foregoing rights shall be subject to the following rules and regulations:

1. The said portion of said railway shall be operated, and the locomotives, cars and trains thereon run under the direction of a General Manager, to be appointed by said Company, subject to the approval of said Trustees, and removable by the concurrent action of said Trustees and said Company, or by decision of arbitrators as hereinafter provided. Said General Manager shall from time to time establish such uniform rules and regulations for the passage of locomotives, cars and trains and the use of grounds, depots and other appendages, as will tend to the most efficient working of said portion of said railway for all purposes, giving preference, however, to travel and traffic over construction, supply and repair trains, except in case of emergency; provided that such rules and regulations shall at all times be subject to the approval of said Company and said Trustees; and, if they can not agree as to the rules and regulations so to be established, the subject matter of difference shall be subject to arbitration as hereinafter provided.

2. The railway business shall in all cases have preference over all other business on the wire by said Trustees.

Article II.

Said Trustees shall during the existence of this license, furnish to said Company a sufficient supply of water. All other railway supplies, including the books of account and forms herein-
500 after required to be used, which may be necessary to do the
business of said portion of said railway promptly, shall be purchased, upon requisitions certified to by said General Manager, by the Company through a Purchasing Agent to be appointed by said Company subject to the approval of said Trustees, and removable by the concurrent action of said Trustees, and said Company, or by decision of arbitrators as hereinafter provided.

Article III.

Said Trustees shall keep and maintain said portion of said railway in good order and repair for the business likely to arise along the line of the same during the existence of this license, and provide such temporary depots, platforms, engine and station houses, repair shops and other facilities as may be necessary or may become necessary for said business, as soon as it can be conveniently done, with the means at their command; and said Company shall furnish to said Trustees, at costs, fuel, and such other railway supplies, as said Company may have, and shall at like costs to said Company, make such repairs of said Trustees' engines and rolling stock, as the means at command of said Company will allow.

Article IV.

No other license for traffic or travel over said portion of said railway shall be granted to any other persons or company, to take effect during the existence of the foregoing license, but the same shall be exclusive as to traffic and travel, and shall continue until six months after the completion of the whole line of the Cincinnati Southern Railway, and the lease thereof for a term of years to said Company or other parties, or a sale thereof when the same shall terminate; but said Trustees shall have the right at any time after eighteen months from the date hereof to terminate this license upon serving
501 written notice of their intention so to do at the principal
office of said Company six months before the day fixed in said notice for the termination thereof.

Article V.

Said company shall as and when directed by the Trustees furnish in good order and keep in repair, sufficient locomotives and other rolling stock to run daily, (Sundays excepted), such trains as will do the business of said portion of said Railway, and shall run the same with its own agents. The number of locomotives and amount of such rolling stock to be furnished from time to time and the costs of the same shall be subject to the approval of said Trustees. No locomotive or other rolling stock shall be run by it thereon that is not in good order and repair, and any such rolling stock not in good order or repair so run on the same and not removed therefrom after reasonable notice, shall be liable to be treated as damage feasant, but nothing herein shall be construed into a duty upon the part of said Trustees to exercise their right.

Article VI.

Said company shall, during the continuance of this license, do every act and thing that may be by law required of or be obligatory upon it or said Trustees, in respect to the operation and use of said portion of said railway by said Company, including the keeping and rendition of all accounts and reports that shall be by law required, either making and returning the same to the proper authorities, or furnishing all the data in its possession to enable the said Trustees to make the same, and in all cases, as the law may require.

Article VII.

A tariff for freight and passengers, and the number, wages and salaries of the officers and employes of said Company shall be
502 fixed by said Company subject to the approval of said Trustees, and be changed from time to time by agreement, and in case of difference the matter in dispute shall be referred to arbitration as hereinafter provided. No pass or permission to travel free on said

Railway shall be granted to any person without the sanction of said Trustees, nor shall any contract be entered into with any Fast Freight or other Company, the effect of which will be to diminish the gross receipts or mileage properly due and proportionally earned for passing over said Railway. And said Company shall not discrimiate against the citizens of Cincinnati in carrying freights or passengers from other railroads, but shall charge and receive only the same and no more for the same services in transporting to and from said city, freight and passengers going to or coming from one of said roads, that is charged or received from those going to or coming from any other of said roads, and no officer of any Fast Freight or Express Company, or competing or connecting Railroad Company shall be a director or officer of said Company.

Article VIII.

Said Company shall keep regular books of account in the most approved form for railway accounts, and use all the most approved forms for the freight and passenger business upon said portion of said Railway, and the business of said telegraph line done under this license, and shall render within the first twenty days of each month, monthly statements to said Trustees, showing the entire earnings and the receipts and disbursements of said Company under this license; and the said Trustees, by themselves or agents, shall have free access to all the books and freight and passage lists, and other writings appertaining to the business done under this license, and may, at their own cost, put their agents on any and all trains, or in any office, depot or place, to test the correctness of all accounts.

503

Article IX.

The entire gross receipts under this license shall be paid by said company daily into such bank or banks as said Trustees shall from time to time designate as depositories to the credit of the Operating Department of said Company, out of which, said Company shall allow and pay as follows, upon vouchers approved by said General Manager.

1. Such amounts as are or may be necessary to pay the current operating expenses and charges including the wages and salaries of the officers and employes of said Company, and the salary of said General Manager.
2. All damages, or liabilities and other expenses, including taxes incurred and paid by said Company on its capital and personal property used in operating said railway.
3. Monthly to said Company out of the gross receipts such sum as shall amount to the rate of seven per centum per annum on its paid up cash capital from the date of payment in, provided, that the amount of said paid up cash capital shall not be increased beyond the sum of three hundred thousand ($300,000) dollars, without the consent of the Trustees, provided, the Company assumes and binds itself to increase its capital stock to not exceeding one million

($1,000,000) dollars, if, in the judgment of the Trustees of the Cincinnati Southern Railway, the business of the road should require it. The balance of said earnings shall be paid to said Trustees monthly with the first twenty days of each month, to fulfill their obligations under this agreement and as and for rent.

Article X.

At the expiration of said lecense or other termination of the same, as hereinbefore provided, said Trustees shall provide for the reimbursement of said Company's outlay and liability, as follows:
504 The persons or Company taking said lease as hereinbefore
provided, or otherwise succeeding said Company in its operation of said Railway, shall take all the engines and other rolling stock and personal property of said Company used in operating said Railway, and shall return and pay to said Company therefor an amount of money, which, together with interest thereon previously received by it, shall be equal to its cash capital actually paid in and used by said Company in operating said Railway, with interest thereon at seven per centum per annum from the date of payment in. Said persons or Company shall likewise assume all such time contracts for the carriage of freight and passengers, or other contracts of a like nature, as may have been sanctioned by said Trustees; and also all outstanding or contingent liabilities of every kind, incurred by said Company in operating said Railway under this license. Said persons or Company shall also save and hold said Company harmless under and against said contracts and liabilities by a good and sufficient bond of indemnity; and in case a dispute shall arise under this article, between said Company and the persons or Company taking a lease of said Railway, or otherwise seceeding said Company in its operation of the same, in regard to the goodness or sufficiency of said bond of indemnity or otherwise, said dispute shall be determined by a majority of arbitrators, who shall be chosen by the said parties, and shall meet and proceed in the manner hereinafter provided in Article Twelfth, and their determination shall be final between the said parties who shall abide by the same. And it is understood and declared by the parties hereto, that the true intent of this agreement is to return, without any deduction whatever, to said Company the amount of cash actually paid in by its stock-holders, and used in operating said Railway, together with
seven per centum per annum from the date of payment in,
505 and to discharge said Company from and indemnify it
against all the contracts and liabilities aforesaid; and this license shall continue and the right to operate said Railway under it, shall in no event cease, until the provisions of this article are fully complied with, anything in this agreement to the contrary, notwithstanding.

Article XI.

In case said Company shall at any time or times during this license fail to pay to said Trustees the monthly balance of the earnings due them under this license, as provided in the Ninth Article hereof for the period of ten days, or shall willfully fail or omit to keep and perform any other of the stipulations hereof, on its part to be kept and performed for the period of thirty days, then, said Trustees or their assigns shall have the right to take possession of the engines, cars and other rolling stock and personal property of said Company used in operating said Railway, on repaying to said Company a sum equal to its actual cash outlay with interest thereon at the rate of seven per cent. per annum from date of payment in to the date of taking possession of said property by said Trustees, or their assigns, and on assuming the contracts and liabilities of said Company, and indemnifying it as provided in Article Tenth hereof. Provided that before said right of forfeiture and taking possession shall be exercised, the same shall be ascertained and determined by arbitrators as hereinafter provided, unless such determination shall be prevented by the act of said Company.

Article XII.

It is also agreed that all questions of difference arising between the parties hereto in relation to the true construction of this agreement or otherwise in reference to the rights of the parties under the same, shall, upon the written demand of either party, be
506 submitted to the arbitration of three disinterested arbitrators,
two of whom shall be experienced railway managers, to be selected as follows: One by each party, and the third by the two so chosen; but if either party shall fail to appoint an arbitrator on its or their part within ten days after written notice of the selection of one by the other party, then the arbitrator selected by the party giving notice shall select a second, and the two thus chosen shall choose the third, and the award of said arbitrators, or a majority of them thus selected, shall be final and conclusive between the parties hereto. The said arbitrators shall meet at Cincinnati, and, on notice to the parties, proceed, without being sworn to hear and determine the controversy; and if it relates to the manner of using said portion of said Railway, or the rules and regulations hereinbefore provided for, or the tariff for freight or passengers, or the number, wages or salaries of the officers or employes of said Company, or the removal of said General Manager, or said Purchasing Agent, said arbitrators shall have power to award and determine the manner of such use, and the proper rules and regulations to be observed, the proper tariff to be fixed, or the number, wages or salaries of the officers of employes of said Company, and to remove said General Manager, or said Purchasing Agent, and to direct either party to do all such acts as may be necessary or expedient to carry their award into effect; and they shall also have the power to award and determine that there has been a forfeiture of this license as provided for in Article Eleventh, and if they shall so adjudge and award, they, or the majority concurring in such award, shall have power, and the said Company does hereby irrevocably appoint them or a majority of them concurring, as its attorneys in fact, with authority and in the

name and in behalf of said Company, to execute and deliver to said Trustees a surrender of this license and all rights under the same, and likewise to deliver to said Trustees, or their assigns the engines,
rolling stock and personal property of said Company used in
507 operating said Railway, upon payment for the same, and on
being discharged from and indemnified against contracts and liabilities as provided in Articles Tenth and Eleventh; and the arbitrators shall have power to determine the costs to be paid and which party shall pay them. And it shall be a good and complete bar to any action at law, or suit in equity founded on any matter, which, by the provisions of this contract, might have been submitted to such arbitration, that no demand for the same had been made; or that the same had been submitted to arbitration under this agreement, and that said arbitration was still pending; or that an award had been made and performed.

Article XIII.

And each of said parties covenants with the other that it will keep and perform all the stipulations of this agreement to be by it or them kept and performed and that they will not evade or violate the same, and particularly that said Company will upon the expiration or other termination of this License, deliver its engines and other rolling stock and property to the persons or Company taking a lease of the whole line of said railway after the completion of the same, as hereinbefore provided, and that in case of a refusal so to do, and in case of a termination of this license through the willful default of said Company as herein provided, it will deliver to said Trustees its said engines and other rolling stock and personal property used in operating said railway, upon payment for the same and on being discharged from and indemnified against contracts, and liabilities as provided in Articles Tenth and Eleventh, and will not attempt to interfere with or interrupt the use of the same by other licensees or lessees of or by said Trustees.

Article XIV.

The said Trustees hereby agree to extend the foregoing license
to such other portions of said railway and telegraph, as they
508 may complete out of their own funds, upon condition that
all the stipulations and covenants of this agreement shall apply with equal force and effect to said extension.

Article XV.

Said Trustees shall allow and hereby grant the said Company the use of two of their engines and forty of their flat cars, to be hereinafter designated, until the said Trustees shall need the same, and said Company accepts the same on the following terms: That it will keep and return the same, upon request, in as good order and repair as the same may be when delivered to it, natural wear and tear excepted.

Article XVI.

And whereas the said Trustees, *by* a certain memorandum of agreement made between them and the Cincinnati Southern Railway Company, dated on the 3rd day of July, A. D. 1877, to which reference is hereby made for the terms and conditions of the same, granted to said railway Company, a determinable license with the rights therein stated, among which is that said Trustees, upon the expiration of said license or other termination of the same, should provide for the reimbursement of said Company's outlay as in the Sixth Article of said agreement is provided. Now the said The Cincinnati Railroad Company, as the successor of the Cincinnati Southern Railway Company, hereby undertakes and agrees to carry out, fulfill and observe all the obligations of the said Trustees as in said Sixth Article provided, and to submit to arbitration any dispute arising out of said Article, as provided by the Seventh Article of said agreement.

In witness whereof, the said The Cincinnati Railroad Company has caused its Corporate Seal and the signature of its President to be hereunto affixed; and the said Trustees have cause A. H. Bugher, president pro tempore of the Board, to sign this agreement *is* triplicate on their behalf as such board, and not individually, on the nineteenth day of May, A. D. 1879. 509

[SEAL.] THE CINCINNATI RAILROAD COMPANY,
By W. J. LIPPINCOTT, *President.*

Attest:
JACOB WIRTH, *Secretary.*

THE BOARD OF TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY,
By A. H. BUGHER, *President pro Tem.*

Executed in triplicate by A. H. Bugher, President pro tempore, in presence of
H. H. TATEM, *Secretary.*

Office Board of Trustees Cincinnati Southern Railway, Cincinnati, O.

March 20th, 1918.

I hereby certify that the above and foregoing is a true and correct copy of an agreement between The Trustees of the Cincinnati Southern Railway and The Cincinnati Railroad Company of date May 19th, 1879..

STANLEY FERGUSON, *Secretary.*

At a meeting February 10, 1880, Mr. Ferguson presented the following Memorandum of Agreement to extend the License of the Cincinnati Railroad Company, to-wit:

"*Memorandum of Agreement Made Between the Trustees of the Cincinnati Southern Railway and The Cincinnati Railroad Company.*

Whereas, by an agreement between the parties aforesaid, made on the 19th day of May, A. D. 1879, there was granted by said Trustees to said Company, upon the terms therein stated, a determinable license, wherein it is agreed, in the Fourteenth Article thereof, that

"The said Trustees hereby agree to extend the foregoing license to
such other portions of said railway and telegraph as they
510 may complete out of their own funds, upon condition that
all the stipulations and covenants of this agreement shall
apply with equal force and effect to said extension.

Now these presents witnesseth, That said Trustees do hereby extend said license over that portion of said railway extending from Somerset, Kentucky, to Boyce Station, Tennessee, and the facilities that are or may be provided by said Trustees out of their trust funds in Chattanooga, upon condition that all the stipulations and covenants of the said agreement of May 19, 1879 shall apply with equal force and effect to this extension.

In witness whereof, the said Trustees have caused Miles Greenwood, President of their Board, to sign this agreement in triplicate on their behalf as such Board, and not individually, and the said The Cincinnati Railroad Company has caused its corporate seal and the signature of its President to be hereto affixed the — day of ——, 1880," which was read and ordered approved and adopted, and that the Secretary prepare the same in triplicate, and that the President sign the same in behalf of the Board when the same shall have been executed properly in behalf of The Cincinnati Railroad Company.

(Volume 7, pp. 55, 56, 57.)

Office Board of Trustees Cincinnati Southern Railway, Cincinnati.

March 20th, 1918.

I hereby certify that the above and foregoing is a true and correct copy of an agreement between The Trustees of the Cincinnati Southern Railway and The Cincinnati Railroad Company—dated May 19th, 1879.

STANLEY FERGUSON, *Secretary.*

511 DEFENDANTS' EXHIBIT NO. 13.

3/22/18. Edward L. Gilmore.

Office of the Cincinnati Railroad Company.

Cincinnati, Sept. 6th, 1879.

The Committee met this day of 10½ o'clock A. M. in called Session, there being

Present, Mess. Clement, Cunningham, Hinkle, Lippincott and Wirth.

Mr. Jacob Wirth, Vice President presiding.

The General Manager presented a communication from Joseph E. Brown President of the Western and Atlantic Railroad Company, enclosing contract in triplicate, executed in behalf of said Company, for the use by the Cincinnati Southern Railway, of the track of said Western and Atlantic Railroad, between Boyce's Station and Chattanooga, for the term of two years from and after December 1st, 1879, of which contract the following is a copy, to wit:

Memorandum of Agreement Between the Western and Atlantic Railroad Company and the Cincinnati Railroad Company.

Whereas, The said Western and Atlantic Railroad Company is the Lessee of the Western and Atlantic Railroad owned by the State of Georgia, and extending from the City of Atlanta, Georgia, into the City of Chattanooga, Tennessee, and the said The Cincinnati Railroad Company is the Licensee of the Trustee of the Cincinnati Southern Railway, under an agreement date- May 19th, A. D. 1879, under which the said Company is operating the Cincinnati Southern Railway as far as completed, and is to operate the whole line extending from *the* Cincinnati to the City of Chattanooga, when completed, and

Whereas, Said line is about to be opened to *to* Boyce's Station, a point about Six miles east of Chattanooga on the Western and Atlantic Railroad.

512 Now, in view of the importance of the connection thus to be made, and the intimate relations that will naturally exist between the Companies operating said railways, it is agreed as follows:

First. That said Western and Atlantic Railroad Company for the consideration hereinafter stated, hereby grants to the said The Cincinnati Railroad Company, the right to pass and repass, and have full and free ingress, egress, and regress, with its engines, cars, officers, agents and servants, to, over, upon and along the main and side-trac*ts*, turn-outs, switches, turn-tables and other like conveniences of that portion of the said Western and Atlantic Railroad which extends from Boyce's Station into Chattanooga, including all connections with other railroads therein so far as said Company has the powe*t* to grant such privileges, in connection with other railroads, together with the right, so far as said Company can grant it, to use the Passenger Depot in Chattanooga, owned jointly by it, the Nashville and Chattanooga and St. Louis Railroad Company and the East Tennessee, Virginia and Georgia Railroad Company.

Second. But all the foregoing rights shall be subject to the following conditions:

That said portion of said railway shall be operated and the locomotives, cars and trains thereon run under such rules and regulations as may be prescribed from time to time by the General Manager of the said Western and Atlantic Railroad Company, Provided,

that the rules and regulations so prescribed shall not give preference to one party over the other in operating said portion of said railway, but the same shall be so used as to interfere as little as possible with each other's business of the same class giving preference however to passenger over freight trains. And it shall be one of the said rules and regulations and the said The Cincinnati Railroad Company hereby agrees at its own expense to maintain a telegraph office at Boyce's Station with a Standard Clock therein, that runs correctly by Atlanta time, and keep on duty a day and night Operator, and no Conductor of said The Cincinnati Railroad Company shall
513 carry a train engine or car, upon the said Western and Atlantic Railroad between Boyce's Station and Chattanooga, until he has first compared his time with said Clock so as to have the correct time of said Western and Atlantic Railroad, and thus prevent collisions that might grow out of the variation of watches of the difference of time of the two roads.

Third. The foregoing license or grant shall continue for two years from the first day of December, 1879, and in consideration of the same, the said The Cincinnati Railroad Company hereby agrees to pay to the said Western and Atlantic Railroad Company the sum of Five Hundred dollars ($500) per mile, per annum counting the distance as six miles, payable in equal monthly installments on the first say of each month, at the office of the said Western and Atlantic Railroad Company in Chattanooga.

Fourth. Each of said parties covenants with the other that it will keep and perform all the stipulations of this Agreement to be by it kept and performed, and that it will not evade or violate the same, and particularly that said The Cincinnati Railroad Company will pay the rent herein reserved at the times stated. And in case said Company shall at any time fail or omit to pay the said rent or any part thereof, and shall continue in default for thirty days, it shall be lawful for said Western and Atlantic Railroad Company, at its own option, and without having made any legal or formal demand for such rent to forfeit and revoke the license or grant herein made, and to prevent the running of the locomotives and cars of the said The Cincinnati Railroad Company on the said portion of the said Western and Atlantic Railroad and to remove the same and all persons therefrom.

In Witness Whereof, The said Western and Atlantic Railroad Company, and the said The Cincinnati Railroad Company have caused their respective Corporate Seals and the Signatures of their respective Presidents to be hereunto affixed in triplicate this Sixth day of September A. D. 1879.

514 [SEAL.] THE WESTERN AND ATLANTIC RAILROAD COMPANY.
(Signed) By JOSEPH E. BROWN, *President*.
[SEAL.] THE CINCINNATI RAILROAD COMPANY.
(Signed) By W. H. CLEMENT, *President*.

Office Board of Trustees Cincinnati Southern Railway.

Cincinnati, March 21, 1918.

I hereby certify that the above and foregoing is a true copy of an Agreement between the Western and Atlantic Railroad Company and The Cincinnati Railroad Company of date September 6, A. D. 1879, as the same appears on pages 49, 50 and 51 of the Minutes of the Executive Committee of The Cincinnati Railroad Company, in Record Book for the years 1879, 1880 and 1881, and which Record Book is in my custody, possession and control as Secretary of the Board of Trustees of the Cincinnati Southern Railway.

(Signed) STANLEY FERGUSON,
Secretary of Board of Trustees
of the Cincinnati Southern Railway.

Endorsed: Contract between Western & Atlantic R. R. Co. and Cincinnati Railroad Co., Sept. 6, 1879.

5

Office Supreme Court, U.
FILED
SEP 9 1918
JAMES D. MAHER,

No. 21 ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1918

THE STATE OF GEORGIA,
Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY, and THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Defendants.

STATEMENT, BRIEF AND ARGUMENT IN BEHALF OF THE STATE OF GEORGIA

WILLIAM A. WIMBISH,
Counsel for the State,
525 Grant Building,
ATLANTA, GEORGIA.

August 31, 1918

JOHNSON-DALLIS CO. PRINTERS ATLANTA GA.

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No. 21 ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM 1918

THE STATE OF GEORGIA,

Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN, RAILWAY and THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,

Defendants.

Statement, Brief and Argument in Behalf of the Complainant, the State of Georgia.

STATEMENT OF THE CASE.

The State of Georgia is the owner of the Western & Atlantic Railroad, a line of railway extending from the city of Atlanta, Georgia, to the city of Chattanooga, Tennessee, a distance of 136.83 miles, of which 15.52 miles lie within Hamilton County, Tennessee.

The Cincinnati Southern Railway, and its lessee, The Cincinnati, New Orleans & Texas Pacific Railway Company, use and occupy a considerable portion of the right of way of the Western & Atlantic Railroad for a distance of about four miles between Boyce station and Chattanooga, in Hamilton County, Tennessee.

The defendants claim authority for the continued use of this right of way under an Act of the General Assembly of the State of Georgia, approved October 8th, 1879, wherein a right or privilege to use this property was granted to the Trustees of the Cincinnati Southern Railway.

Complainant contends that the right or privilege conferred in the Act of 1879 was permissive only and was revoked and withdrawn by an Act of the General Assembly of the State of Georgia, approved August 21, 1916. This is the controlling issue in the case.

The Act of 1916 by its terms repealed the Act of 1879, and directed the discontinuance of the use of the State's property. The Act provided that the permissive use might be continued for a limited time upon the conditions therein named.

The defendants formally declined to recognize the right of the State to withdraw the privilege theretofore granted, and declined to discontinue their use of the property, asserting that under the Act of 1879 they had acquired a permanent easement in the property, which the State was without power to revoke.

Thereupon the State of Georgia asked and received permission to and accordingly did file in this Honorable Court its original bill, addressed to the original jurisdiction of the Court, seeking a perpetual injunction against the further use and occupation of the property by the defendants, or either of them.

The defendants answered the bill; evidence was taken, and the record made up and closed, under appropriate orders of the Court. Briefs have been directed to be filed, and the case has been assigned for oral argument before the Court.

The Pleadings.

The original bill alleges that the State of Georgia owns the Western & Atlantic Railroad in its public or governmental capacity, the title to the property being vested directly and immediately in the State; that the State was induced to grant the use of a defined portion of its right of way to the Trustees of the Cincinnati Southern Railway, upon the representation that said railway would become an important feeder and a practical extension of the State's Western & Atlantic Railroad; and that, there being at the time no existing need for the use of all of said right of way for the convenient operation of the Western & Atlantic Railroad, the General Assembly of Georgia adopted the Act of October 8th, 1879, giving to the Trustees of the Cincinnati Southern Railway, for the use of said railway, a permissive right to use a portion of the right of way of said Western & Atlantic Railroad as defined in said Act, between Boyce station and Chattanooga, Tennessee.

In said bill it is further alleged that shortly after its completion the Cincinnati Southern Railway was leased for a long term of years to The Cincinnati, New Orleans & Texas Pacific Railway Company, a line affiliated with the Southern Railway Company; and that so far from being an important feeder and a practical extension of the Western & Atlantic Railroad, the Cincinnati Southern Railway has been and is being operated as an active, strong and aggressive competitor of the Western & Atlantic Railroad, whereby the State of Georgia has been deprived of the benefit it reasonably anticipated would flow to it from the representations made at the time the permissive use of its property was granted.

It is further alleged that the need of the Western & Atlantic Railroad for the use of all of its right of way between Boyce station and Chattanooga, Tennessee, became urgent for the accommodation of its own traffic; that the Western & Atlantic Railroad was being restricted to the use of some forty feet of its own right of way, which was inadequate for its needs, while the Cincinnati Southern Railway and its lessee owned an adjacent right of way of ample width upon which their tracks and superstructure now on the property of the State could be conveniently shifted without in any way impairing their ability to adequately and efficiently serve the public as a common carrier.

It is further alleged that influenced by these considerations the General Assembly of Georgia adopted the Act of August 21st, 1916, repealing the said Act of October 8th, 1879, thereby withdrawing and revoking the permission to use the State's property, as given in said last mentioned Act.

It is further alleged that the Act of 1879 conferred upon the Trustees of the Cincinnati Southern Railway a revocable license or privilege which was in law and fact revoked and withdrawn by the said Act of 1916, so that the continued use and occupation of the State's property by the defendants, or either of them, is without warrant in law and constitutes a continuing trespass and a constantly recurring grievance, occasioning irreparable injury, incapable of pecuniary estimation.

The bill prays that the defendants be perpetually enjoined from the operation of trains over and upon the right of way in controversy, or any part thereof; or from entry upon, or the commission of any act of trespass on said right of way incident to or in connection with the operation of trains and the conduct of the business of transportation; and from in any way disturbing or interfering with the possession and the free and unrestricted use of its said right of way by and in behalf of or under authority from the complainant, the State of Georgia. Inasmuch as the State sought equity it offered to do equity, and asks that the injunction prayed for be granted upon such terms as may appear to the Court to be just and equitable as between the parties; and to this end that the defendants be permitted within such reasonable time as may be limited by the Court to remove from the said right of way of the Western & Atlantic Railroad their tracks, rails, ties and superstructure, to the extent that it may be done without undue delay, and without injury to the freehold. The bill further contained a prayer for general relief and for process. (Trans., pp. 4-11.)

The answer of the defendants denies that the State of Georgia owns the Western & Atlantic Railroad in its governmental capacity, claiming that with respect to this property the State is subject to all of the incidents of private ownership; that said Act of October 8th, 1879, granted to the said Trustees a perpetual easement in the property; that pursuant to said grant the said Trustees took immediate possession of that portion of the right of way of the Western and Atlantic Railroad therein defined, and have since been "in open, notorious, continuous and adverse possession of the same under said grant," and that if the defendants have not title to said right of way otherwise they claim title thereto by prescription under the laws of the State of Tennessee.

They further say that a material inducement to the State of Georgia to grant the right claimed consisted in the fact recited in said Act, that it would be to the advantage of both railroads to locate their tracks and works close together, thus saving expense to one in construction, and to both in maintaining the road-bed, and facilitating railroad operation, and giving to both railroads the advantage of a stronger and firmer road-bed through a route subject to overflow by floods in the Tennessee river. The claim is made "that the benefits ensuing therefrom to the State of Georgia were of the utmost value, and the construction of a road-bed protecting the right of way of the Western & Atlantic Railroad has been through all these years, and still is, a valuable consideration for said grant."

The answer admits that the defendants own and possess a right of way from Boyce to Chattanooga, Tennessee, adjacent to and parallel with that of the Western & Atlantic Railroad, the said right of way being of a width of one hundred feet for the greater part of the distance, and for the remaining distance being about one hundred and fifty feet in width. They deny, however, that the tracks of the Cincinnati Southern Railway can conveniently be shifted to this right of way, and say that it would involve great expense and require a rearrangement of their yards.

The answer further alleges that the Western & Atlantic Railroad, together with its property and appurtenances, was leased by the State of Georgia to the Nashville, Chattanooga & St. Louis Railway for a term not yet expired; wherefore they say that the State of Georgia has not possession, or right of possession, to the Western & Atlantic Railroad, or any of its properties, including the right of way in question; and that the State being neither in possession, nor entitled to possession, cannot maintain this suit. (Trans. 17-29.)

The Georgia Act of 1879 under which the defendants claim.

A full copy of this Act of October 8th, 1879, under which defendants set up claim of the grant of a permanent easement appears in full as Exhibit A. to the original bill. (Trans. p. 11-12.)

It is recited in the Act that the city of Cincinnati had nearly completed the Cincinnati Southern Railway, "a grand trunk line which will be of great benefit to the State of Georgia forming a most important feeder and practically an extension of the Western & Atlantic Railroad, which is the property of the State", and affording direct connection with the railway systems of the north and west.

It is then stated that the Cincinnati Southern Railway reaches the Western & Atlantic Railroad at Boyce station, and for most of the distance from thence to the terminus of the two railroads at Chattanooga their routes run parallel to and adjoining each other.

It is further recited that it would be an advantage to both roads to locate their tracks and works near together, thus saving expense to one in construction and to both in maintenance and operation; "and give to both railroads the advantage of a stronger and firmer road bed through a route subject to overflow by floods in the Tennessee river."

Following these recitals the Act grants "to the Trustees of the Cincinnati Southern Railway, for the use of said Railway, the use of that portion of the Western & Atlantic Railroad between Boyce Station, Tennessee, and Chattanooga, Tennessee, terminus, that lies westerly of a line running parallel with and nine and a half feet westerly from the center of the track of the Western & Atlantic Railroad."

The grant of the use was made subject to the consent of the then lessees of the Western & Atlantic Railroad as to the term of their lease; and it was provided that the grade of the Cincinnati Southern Railway should be the same as that of the Western & Atlantic Railroad.

The Repealing Act of 1916.

A copy of the Act of August 21st, 1916, repealing the Act of October 8th, 1879, and withdrawing the privilege therein granted to the Trustees of the Cincinnati Southern Railway appears as Exhibit C. to the original bill. (Trans. p. 13-14.)

This Act refers to the Act of 1879, and declares that the use therein granted was permissive only and was personal to the Trustees of the Cincinnati Southern Railway. It was then declared that the consideration moving the State to the grant of this use of its property was that the Cincinnati Southern Railway would become an important feeder and practically an extension of the Western & Atlantic Railroad; that the Cincinnati Southern Railway is no longer operated by the city of Cincinnati, or by the Trustees of the city, but has been leased for a long term of years to a Railway Company owned or controlled by interests competitive with the Western & Atlantic Railroad; and that the Cincinnati Southern Railway, so leased and operated, is not an important feeder and practically an extension of the Western & Atlantic Railroad, but is a direct and aggressive competitor therewith.

It is further declared that this portion of the State's right of way is or will be a part of the Chattanooga terminal system of the Western & Atlantic Railroad, and that the need of the road for the use of this right of way is urgent and necessary for the expeditious handling of its traffic in the public interest; and that the lessee of the Cincinnati Southern Railway is reputed to own an ample adjoining right of way upon which its tracks could be shifted and operated without materially affecting its entrance into the city of Chattanooga.

Then follows the clause repealing the Act of October 8th, 1879. In order, however, that the Railway Company might have full opportunity for readjusting its tracks without shock to its business it was further enacted that the Cincinnati Southern Railway and its lessee should be permitted to continue its use and occupancy of the State's property for such further time as might be agreed on with the Western & Atlantic Railroad Commission as reasonably necessary for them to readjust and construct their line of railway on property other than that of the Western & Atlantic Railroad; and that in such event they should have the right to remove from the right of way of the Western & Atlantic Railroad all of their tracks, rails, ties, superstructure and other railway appurtenances, owned by them and placed on said right of way under the said Act of October 8th, 1879.

Attitude of the Trustees.

The defendants declined to recognize the right of the State to withdraw the privilege theretofore granted; and under date of September 18th, 1916, the Trustees of the Cincinnati Southern Railway, for themselves and in behalf of their lessee, presented to the Governor of the State and to the Western & Atlantic Railroad Commission, their declaration in writing, wherein it was claimed that the right of the said Trustees and their lessee to use and occupy the right of way in question, was under and by virtue of the Act of 1879, "the same being a perpetual grant of said right of way to said Trustees, and that the same was not and is not subject to derogation or repeal by the State of Georgia." They avow that the possession of the said right of way is not to be referred to the permission given in the said Act of 1916, "but is to be referable to said grant of October 8th, 1879, and their subsequent possession, use and improvement thereof and expenditures thereon with the knowledge and acquiescence and to the estoppel of the State of Georgia and its lessee to dispute the same." (Trans. p. 14-15.)

Occupation by the Cincinnati Southern Railway.

Under the laws of the State of Ohio the city of Cincinnati was authorized to construct and own a line of railway extending from that city to Chattanooga, Tennessee, to be known as the Cincinnati Southern Railway. Title to the property and the conduct of the affairs of the Railway were vested in a Board of Trustees. These Trustees proceeded with the construction of this Railway, which prior to the adoption of the Georgia Act of 1879, had been practically completed from Cincinnati to Boyce station, Tennessee, where physical connection was had with the Western & Atlantic Railroad. From Boyce station to Chattanooga a right of way of 100 feet or more in width had been obtained for the construction of the Cincinnati Southern Railway. This right of way was parallel with and immediately adjacent to that of the Western & Atlantic Railroad. The right of way of the Western & Atlantic Railroad was only 66 feet in width.

Following the passage of the Act above recited, the Trustees of the Cincinnati Southern Railway, claiming to act under authority thereof, proceeded to construct their railway over and upon the right of way of the Western & Atlantic Railroad for a distance of about four miles by widening and extending the existing cuts and fills of that railroad, where necessary. The occupation began at a point near Boyce station and continued on the westerly or right hand side of the Western & Atlantic Railroad for a distance of 19,537 feet to a point near the interlocking tower within the corporate limits of the city of Chattanooga at which point the tracks of the Cincinnati Southern crossed over those of the Western & Atlantic, and from thence proceeded along the south or left side of the Western & Atlantic right of way for a distance of 1750 feet, the width of the encroachment being 23½ feet, excepting at the beginning, crossing and ending points. (Trans. p. 43.) This construction was completed and operation of through trains of the Cincinnati Southern thereover was begun in the summer of 1881. (Trans. p. 232-3.)

The Trustees of the Cincinnati Southern Railway graded a roadway from its line above Boyce to a direct connection with the Western & Atlantic Railroad. At this point of connection yards were laid out and partially graded, evidently designed to be used in the interchange of business between the Cincinnati Southern and the Western & Atlantic. This construction was never completed, presumably because after lease of the Cincinnati Southern to The Cincinnati, New Orleans & Texas Pacific Railway Company a change of policy was adopted with reference to the interchange of business with the Western & Atlantic Railroad. (Trans. p. 63-4; 109.)

Occupation by The Cincinnati, New Orleans & Texas Pacific Railway Company.

Shortly after the completion of the Cincinnati Southern Railway into Chattanooga, under date of October 11th, 1881, this railway was leased for a term of years to The Cincinnati, New Orleans & Texas Pacific Railway Company, an Ohio corporation. This lease was subsequently renewed for a long term of years and will not expire until the year 1966. Claiming under this lease The Cincinnati, New Orleans & Texas Pacific Railway Company entered upon and has since enjoyed the use and occupation of this portion of the right of way of the Western & Atlantic Railroad for which authority was claimed under the Georgia Act of 1879.

Thereafter, as convenient opportunity afforded, the adjoining right of way of the Cincinnati Southern Railway was developed and adapted to use. A roadway has been built up and tracks have been laid thereon for a large part of the distance between Boyce and Chattanooga. The use of the right of way of the Western & Atlantic Railroad and the operation of the main line and other tracks thereon has been continued without dimunition by the Cincinnati, New Orleans & Texas Pacific Railway Company. It thus transpired that this Railway Company, as the lessee of the Cincinnati Southern Railway possessed and enjoyed a right of way of liberal proportions fully adequate to the accommodation of their tracks and business, while the Western & Atlantic Railroad was being confined in its operation to a width of only 42½ feet of its own right of way.

In the meantime the growth of the traffic became such that the demand of the Western & Atlantic Railroad for the use of all of its right of way in order to adequately serve its needs and those of the public persisted and became urgent. This right of way furnished the immediate approach to the Western & Atlantic terminals at Chattanooga, and was being required for use in connection with that terminal system. While the traffic of The Cincinnati, New Orleans & Texas Pacific Railway likewise showed a great increase, the right of way and property of that railway was and is ample to meet all of its transportation requirements, and enable it to conveniently perform its public duties and exercise its corporate attributes.

Operation of The Cincinnati, New Orleans & Texas Pacific Railway Company.

Whatever may have been the original intention of the Trustees to so operate the Cincinnati Southern Railway as to make it an important feeder and practically an extension of the Western & Atlantic Railroad any such purpose was abandoned when the Railway was leased by The Cincinnati, New Orleans & Texas Pacific Railway Company.

While in the early years there was some interchange of business at Chattanooga the Western & Atlantic Railroad even then was never so much as a favored connection of that Railway. Shortly after this lease the East Tennessee, Virginia & Georgia Railway Company (subsequently acquired by the Southern Railway Company) constructed a line of railway from Chattanooga to Atlanta parallel with and an average of 10 miles distant from the Western & Atlantic Railroad. (Trans. 90, 92.) Thereafter the East Tennessee, Virginia & Georgia Railway became a favored connection of The Cincinnati, New Orleans & Texas Pacific Railway Company in the interchange of business at Chattanooga. (Trans. 209.)

In the early nineties The Cincinnati, New Orleans & Texas Pacific Railway Company passed into the hands of and was operated by receivers until the year 1899 or 1900. In the meantime the Southern Railway Company had been organized. After The Cincinnati, New Orleans & Texas Pacific Railway was relieved from the receivership it became closely affiliated with the Southern Railway, which then became not only a favored but almost the exclusive connection of The Cincinnati, New Orleans & Texas Pacific Railway for competitive business moving from Cincinnati and beyond to Atlanta and beyond. The Southern Railway Company in its own behalf, and by reason of its ownership of a majority of shares in the Alabama Great Southern Railroad Company and the Southwestern Construction Company, controlled 68.5 per cent of the common stock of The Cincinnati, New Orleans & Texas Pacific Railway Company, thereby giving the Southern Railway a dominant interest in that Railway Company. The then President of the Southern Railway Company on October 16th, 1899, became President of The Cincinnati, New Orleans & Texas Pacific Railway Company, and the several subsequent Presidents of the Southern Railway Company since that time have also been, respectively, President of The Cincinnati, New Orleans

& Texas Pacific Railway Company. (Stipulation, Trans. p. 238.)

Upon the organization of the Southern Railway System, The Cincinnati, New Orleans & Texas Pacific Railway Company was included in the System, Lines West. The Cincinnati, New Orleans & Texas Pacific Railway preserved its separate corporate organization, but it came to be operated as a part of the Southern Railway System, Lines West, under the direction of the executive and operating officials holding the same or a similar relation to the Southern Railway Company. All of the railroads in the Southern Railway System, Lines West, are operated under the same general officers. The Southern Railway System is not a corporation, but is an association of affiliated lines for convenient and economical administration and operation. (Stipulation, Trans. 239-40.)

As a result of the close affiliation and practical operating unity above shown, The Cincinnati, New Orleans & Texas Pacific Railway Company has not for many years given any business whatever, within its control, to the Western & Atlantic Railroad.

Prior to the organization of the Southern Railway Company a through Pullman car service was operated between Cincinnati, Atlanta and Jacksonville. Between Cincinnati and Atlanta the service was operated over The Cincinnati, New Orleans & Texas Pacific Railway and the Western & Atlantic Railroad. That through service was discontinued and has never been resumed, nor has there since been any through service between Cincinnati and Atlanta over that route. The through car service from Cincinnati to Atlanta and beyond is via The Cincinnati, New Orleans & Texas Pacific Railway to Chattanooga, and thence by Southern Railway to Atlanta and beyond, being wholly over lines of the Southern Railway System, Lines West. (Trans. 83, 88.) So far as passenger traffic is concerned the Cincinnati Southern under the operation of its lessee is not a feeder of the Western & Atlantic. (Trans. 82.)

The Cincinnati, New Orleans & Texas Pacific gives no freight to the Western & Atlantic, other than non-competitive freight, or such as is routed by shipper, or consignee, or originating or connecting line over the Western & Atlantic. That Railway does not voluntarily route any freight whatever from Cincinnati to Atlanta and beyond over the Western & Atlantic. (Trans. 90.)

Since the opening of the Knoxville division of the Louisville & Nashville Railroad from Cincinnati to Atlanta the Louisville & Nashville will accept no through business between Cincinnati and Atlanta over its line via Nashville and Louisville. All of such through business to Cincinnati from Atlanta and beyond over the Western & Atlantic Railroad is given to The Cincinnati, New Orleans & Texas Pacific Railway at Chattanooga, because that is the only open through route in the haul over which the Western & Atlantic could participate. In return for this large volume of business The Cincinnati, New Orleans & Texas Pacific Railway gives nothing that it can control to the Western & Atlantic. (Trans. 91-2.)

In the absence of any interest on the part of The Cincinnati, New Orleans & Texas Pacific in having the freight diverted at Chattanooga to another line traffic from Cincinnati and beyond to Atlanta and beyond would naturally and normally move over the Western & Atlantic Railroad; and a large part of this traffic would normally so move in reciprocation for the large volume of business in the reverse direction given to The Cincinnati, New Orleans & Texas Pacific by the Western & Atlantic. (Trans. p. 94.)

Character and effect of overflow from the Tennessee River.

1. *The physical situation*: The general direction of the Western & Atlantic Railroad from Atlanta is northwesterly across the State line to a point in Hamilton County, Tennessee, northeast of Chattanooga. From this point to a point just beyond the National Cemetery within the city limits of Chattanooga the direction is southwesterly, and from thence to the Union Station the route proceeds in a westerly direction. From Boyce Station to Chattanooga city limits the route of the Railroad is, roughly speaking, parallel with the Tennessee river, being from three-quarters of a mile to a mile and a quarter distant therefrom. This detour of the Western & Atlantic Railroad to Boyce and thence to Chattanooga was occasioned by the mountainous character of the region, and was intended to avoid crossing over or under Missionary Ridge which lies south of Chattanooga.

From Boyce to a point near the interlocking tower within the limits of Chattanooga, a distance of about four miles, the Cincinnati Southern Railway occupies the westerly or river side of the Western & Atlantic right of way.

Near the interlocking tower the tracks of the Cincinnati Southern Railway cross those of the Western & Atlantic Railroad, and from thence encroach upon the south side of this right of way for a distance of 1750 feet.

The flow of the Tennessee river is southerly in its course until it reaches a point about opposite Citico above Chattanooga. From thence it makes a curve in the form of a crescent westerly and southerly until it reaches the foot of Lookout Mountain south of the city, where the flow of the river reverses its direction and forms a sharp curve, known as Moccasin Bend. Chattanooga creek flows westerly along the southern border of the city and debouches into the Ten-

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nessee river at the foot of Lookout Mountain opposite Moccasin Bend. Some distance from the mouth of this creek there is a valley or depressed area extending to, along and between the tracks of the Western & Atlantic Railroad and the National Cemetery, where there is a lagoon in which water customarily stands.

The sketch map on the opposite page of this brief indicates the geography of this immediate region.

2. *Character of the overflow*: In times of high water in the Tennessee river the overflow first manifests itself at or near the mouth of Chattanooga creek opposite Moccasin Bend, and thence extends up the creek to the valley mentioned, and thence along this depression to a point opposite the National Cemetery, where it first reaches the embankment of the Western & Atlantic Railroad.

As the water rises the overflow continues along and over the Western & Atlantic Railroad right of way in both directions. This back flow passes through culverts under the Western & Atlantic Railroad thereby preserving substantially the same level of water on each side of the right of way. (Trans. 135, 142, 158.)

All of this overflow is back water without perceptible current until the water reaches the stage or tide of 50 feet above the level of the river, designated as zero by the signal service. When the river reaches a tide in excess of 50 feet the water breaks over at a point above the city of Chattanooga about opposite Citico, and a strong current sets in which flows toward the depressed area near the National Cemetery, where it crosses over the railroad tracks, and thence finds its way back to the river at Lookout Mountain. (Trans. 158, 160, 161.)

3. *Periods of flood*: The record shows only three periods of flood within the past fifty years when the river was suf-

ficiently high to produce a current and cause any damage to the Railroad. There has been only one such flood during the past 43 years.

The first flood shown was that of 1867, when the water reached a tide of 58.95 feet, the highest ever known. (Trans. 175.) The next time of flood was in 1875 when the water reached a height of 54 feet (Trans. 157, 170.) The third and last of these floods, and the only one since the Cincinnati Southern Railway was built, was in 1886, when there was a tide of 52 feet. (Trans. 175.)

Overflows from the river occur almost every year; frequently the water has been high enough to come well up on the railroad embankments; and several times it has submerged the tracks for considerable distances, as in 1917 when there was a tide of 47.7 feet, which completely covered the tracks from near Boyce to Chattanooga. Some of the periods of high water are indicated at pages 170 and 171 of the Transcript.

No appreciable damage to the tracks or embankments on either side of the right of way was ever occasioned by these overflows. It is only after the river had reached a tide in excess of 50 feet, and the current set in, that any damage is shown to have occurred.

The only place where damage is shown to have been occasioned by either of these three floods is opposite the National Cemetery, where the current flows over and across the railroad embankment.

The damage shown to have occurred at that locality was almost wholly confined to the surface of the roadway, except perhaps some damage to the embankment on the Western & Atlantic side opposite the National Cemetery, where the force of the current as the water receded seems to have produced some erosion.

4. *Extent of the damage from flood tide*: There is no testimony as to any damage that may have been caused by the flood of 1867. The water during that flood, being the highest ever known, presumably caused some damage, but as to the fact, character, and extent of such damage this record is silent.

The only flood prior to the building of the Cincinnati Southern Railway which is shown to have occasioned damage was that of 1875.

Only two witnesses testified concerning the character of this flood, and only one as to the damage to the Western & Atlantic Railroad therefrom. James Hickson who had lived in Chattanooga continuously since 1863 or 1864 remembered the flood of 1875. The overflow covered the tracks of the Western & Atlantic Railroad, and extended over the surrounding country. After the flood had receded Mr. Hickson went out some distance along the line of the Western & Atlantic Railroad, and observed that near the National Cemetery the tracks were washed out and the ties were thrown up on the right of way. The water was four or five feet above the surface of the track, and drift wood coming over would "catch and stick". The track was torn loose in places and upset. Some of the dirt was gone; not all of it, just some of it was washed out at the top of the roadway. So far as Mr. Hickson knew or observed there was no other place where any damage occurred. (Trans. 135-136, 139.)

William M. Nixon had been engaged in various kinds of business in Chattanooga since 1870. His knowledge of the damage done by the flood of 1875 to the Western & Atlantic Railroad was confined to his recollection that traffic on all of the railroads leading into Chattanooga was suspended for something like ten days. (Trans. 163.) Mr. Nixon, however, did see this flood "in action," and was informed concerning the height of the water and its manifestations. The water reached a height of 54 feet and covered the tracks of the Western & Atlantic Railroad for some seven feet. The current crossed the railroad in the neighborhood of the National Cemetery following the course hereinabove indicated. (Trans. 166, 157.)

Mr. Nixon stated that the embankment and roadway of the Western & Atlantic along by the cemetery had withstood the action of the back water without damage as far back as he could recall. His observation and information was that this embankment and roadway had never been affected by high water "until the current tackled it"; that is, until the river reached a flood tide of 50 feet and the current set in across that locality. Trans. 164.)

Other witnesses testified concerning the damage caused by the flood of 1886. Isaac Pennebaker, for many years a locomotive engineer for The Cincinnati, New Orleans & Texas Pacific Railway, testified that the flood of 1886 washed up the tracks of the Cincinnati Southern near the National Cemetery. The current broke over the railroad embankment and did considerable damage. The Western & Atlantic embankment was also torn up considerably, but Mr. Pennebaker could not state the extent of that damage, nor did he remember whether the damage to the Western & Atlantic side was greater than that to the Cincinnati Southern side of the embankment. (Trans. 115, 116, 118.)

R. B. Stegall, formerly yard master of the Cincinnati Southern, testified that during the flood of 1886 the water submerged the tracks practically all the way from Boyce to Chattanooga. The damage to the roadbed occurred near the National Cemetery. The tracks of the Cincinnati Southern were washed over on those of the Western & Atlantic. Some damage was also done to the Western & Atlantic tracks for some distance. (Trans. 123, 125.)

W. H. Ray, employed in the car department, made only a casual examination of the effect of this flood. In passing along near the National Cemetery he saw the Cincinnati Southern tracks washed up against and on top of the Western & Atlantic Railroad. There was a considerable amount of debris piled on the tracks. The damage to the Cincinnati Southern seemed to be greater than to the Western & Atlantic. It struck his casual attention that "our tracks" —those of the Cincinnati Southern—were over on the Western & Atlantic. He did not examine the Western & Atlantic side to see how much it had been damaged. (Trans. 126, 128, 129.)

John H. Ribble, formerly employed in the operating department of the Railway, was promoted to be bridge foreman on April 6th, 1886, which was during the time of the flood of that year. He went in a boat from Boyce to Chattanooga over the right of way. He found that there was a swift current in the water in the direction of and along by the National Cemetery. Mr. Ribble did not testify concerning the extent of the damage done by the flood. (Trans. 141.)

Peter Garman, an employee of the Railway since March, 1881, also came from Boyce to Chattanooga in a boat during the high water in 1886. At a point below the Southern Railway crossing between McCallie Avenue and the National Cemetery the Cincinnati Southern roadbed was washed out under the edge of the ties, and in some places between the ties. There was considerable wash. The Cincinnati Southern track was thrown over on that of the Western & Atlantic. The tracks of the Western & Atlantic were moved a little, but not substantially damaged. (Trans 146.) There was no damage to the Cincinnati Southern except at the point near Cemetery Hill. The side of the embankment was not damaged. (Trans. 149.)

William M. Nixon, who testified concerning the flood of 1875, also observed the flood of 1886. However, he made no personal examination, his testimony concerning damage to the railroad being hypothetical and theoretical. He personally knew nothing of any damage that was done by either flood other than as indicated by the fact that there was a flood tide causing suspension of traffic for a short while. (Trans. 163.) While he never saw the effect of these floods he did observe them in action and gave testimony with reference thereto. (Trans. 166.)

History and Ownership of the Western & Atlantic Railroad.

A brief review of the legislative and political history of the Western & Atlantic Railroad will serve to define the relation of the State to this property, and conduce to a clearer understanding of the legislative intent underlying the Act of 1879.

The building of the Western & Atlantic Railroad was initiated by the State of Georgia as a great public work. The purpose found its first expression in a resolution adopted by the General Assembly of Georgia in 1834 (Georgia Acts of 1834, page 238) declaring that the times required and the resources of the State authorized a scheme of internal improvement by railroad construction "on the faith and credit of the State as a great State work."

About this time the city of Cincinnati enlisted public interest in a great scheme for the building of a railroad from the Ohio river to the Atlantic seaboard. It was proposed that this railroad should extend from the city of Cincinnati by way of Knoxville, Tennessee, to the city of Charleston, South Carolina. The several States and municipalities interested united in a call for a conference to be held at Knoxville for the purpose of promoting this enterprise. At this conference, which was held in Knoxville on July 4th, 1836, the State of Georgia was represented and undertook to influence the building of this trunk line through the territory of the State of Georgia. Failing in this, the plan was evolved under which the State of Georgia would build a railroad from a point in the interior of the State to a point on or near the Tennessee line, from which point the State of Tennessee or its citizens would construct a railroad to Knoxville, the idea being that the two roads so proposed would form a connection at Knoxville with the contemplated trunk line from Cincinnati to the Atlantic seaboard.

The State of Tennessee incorporated a company designated as the Hiwassee Railroad Company for the building of the road from Knoxville to the Southern boundary of the State. The State of Tennessee was an original subscriber to the stock of this Company.

The State of Georgia preferred its original idea of constructing its own railroad as a great State work, and the Governor of Georgia in his message in 1836 (House Journal of 1836, page 22) referred to the Knoxville convention and recommended that the State of Georgia should build a line of road to connect with the great trunk line proposed.

At this time railroads were being constructed from Augusta, Georgia, and from Savannah, Georgia, which lines it was contemplated would converge at an interior point in the State of Georgia near the east bank of the Chattahoochee river. The building of the railroad from this point to a connection with that proposed from Cincinnati to the Atlantic seaboard would have afforded a direct route from Cincinnati through the territory of Georgia to the Atlantic ports of Charleston and Savannah.

Acting upon the recommendation of the Governor, the General Assembly of Georgia on December 21st, 1836, adopted an Act (Acts of 1836, page 214) providing for the creation and building of a railroad with State funds from some point on the Tennessee line near the Tennessee river to a point on the southeastern bank of the Chattahoochee river in the State of Georgia most eligible for the extension of branch roads to other points within the State. It is therein declared that the road so to be constructed should be designated as "The Western & Atlantic Railroad of the State of Georgia".

The Legislature also adopted a resolution (Acts 1836, page 3 of Resolutions) requesting the Governor of Georgia to communicate with the Governor of Tennessee the intention of the State of Georgia to build a railroad to a point on the Tennessee line, and to ascertain upon what terms the State of Tennessee would be willing to allow the extension of the road from the Georgia State line to the Tennessee river.

Thereafter on November 23rd, 1837 (Acts of 1837, page 270) the Legislature of Georgia adopted a resolution requesting the Governor "to despatch forthwith a special agent to negotiate in behalf of this State with the Legislature of the State of Tennessee, now in session, for the purpose of obtaining an Act from them authorizing the extension of our State road from the Georgia line through the territory of Tennessee to the Tennessee river." At the same session the General Assembly passed an Act (Acts or 1837, page 210) looking to the building of the Western & Atlantic Railroad beyond the State line in the territory of

Tennessee to the Tennessee river, provided the right to do so could be secured from the State of Tennessee on terms that might be deemed reasonable by the Governor of Georgia.

Pursuant to the direction and authority above referred to an agent of the State of Georgia was despatched and did proceed to negotiate with the Legislature of Tennessee concerning the terms upon which the State of Georgia would be permitted to construct her road within the State of Tennessee. These negotiations resulted in the adoption of an Act by the General Assembly of the State of Tennessee, passed January 24th, 1838, (Acts of Tennessee 1837-8, Chap. 221, page 319) entitled "An Act to authorize the State of Georgia to extend her Western & Atlantic Railroad from the Georgia line to some point on the eastern margin of the Tennessee river". The grant of the right to construct the railroad was made directly to the State of Georgia; and it was provided that with respect thereto "she (the State of Georgia) shall be entitled to all the privileges, rights and immunities (except the subscription on the part of Tennessee) and be subject to the same restrictions as far as they are applicable", as prescribed for the benefit, government and direction of the Hiwassee Railroad.

Pursuant to this authority the State of Georgia proceeded to acquire the necessary rights of way and properties and to construct her said railway from the Tennessee line to a point on the eastern margin of the Tennessee river.

The right of the State of Georgia to build and operate her railroad within the State of Tennessee thus resulted from negotiations between these States, acting with reference thereto in their sovereign or governmental capacity. The reciprocal legislation predicating and attending the grant to the State of Georgia of the right to own and operate her State railroad within the territory of Tennessee, in some of its features resembles a treaty, and is as nearly a compact between States of the Union as could be had without the express consent of and ratification by Congress.

That the State of Tennessee intended to vest this right and power in the State of Georgia, as one of the sovereign States of the American Union, and not in a merely proprietary capacity subject to the incidents of private ownership, is made clear by the deliberate and solemn declaration of the General Assembly of that State, in a memorial addressed to the General Assembly of Georgia appearing at page 227 of the Transcript. In this memorial, which bears date November 10, 1851, reference is made to the Western & Atlantic Railroad, which is declared to be the exclusive property of the State of Georgia, its property and rights being vested in a sovereignty, and consequently exempt from the liabilities that attach to individuals or companies of incorporation.

The actual construction of the Western & Atlantic Railroad was begun in 1838, and the road was opened for through traffic between Atlanta and Chattanooga in May, 1851.

It is interesting to note that the building of this railroad determined the location and directly contributed to the creation of both Atlanta and Chattanooga, two of the most flourishing cities in the South, neither of which had any prior existence.

Operation of the Western & Atlantic Railroad.

1. *Operation by the State*: From the beginning until December, 1870, the Western & Atlantic Railroad was operated directly by the State of Georgia through the Governor and other public agents appointed under legislative authority, without any incorporation or other intermediary agency.

The Western & Atlantic Railroad being purely public property, wholly employed for public uses, the sovereignty of the State with respect thereto inherently embraced the operations of the railroad by the State. The aggrieved citizen who had suffered injury to person or property, or otherwise had just cause for complaint, had no adequate redress therefor. Because of the sovereign character of the owner and operator of the property no suit could be maintained, nor was the State legally subject to the rules of liability governing common carriers. There was no redress for any injury resulting from the operation of the railroad by the State, other than by petition to the Legislature. Early in the operation of the railroad it came to be realized that such a tedious and expensive procedure was a hardship upon the public, and frequently amounted to a denial of justice.

The same situation obtained with respect to the operation of the Western & Atlantic Railroad within the State of Tennessee. It was recognized that Georgia possessed the same immunities from legal liability and suit in Tennessee as she enjoyed within her own State; in other words, that the State of Georgia with relation to the Western & Atlantic Railroad, in Tennessee, was not subject to the incidents of private ownership and operation.

The Legislature of Tennessee, believing that substantial justice required that the State of Georgia should submit to the liability of common carriers in the operation of her railroad, under date of November 10, 1851, addressed a memorial to the Legislature of Georgia presenting and asking redress for this and other grievances. (Acts of Tennessee 1851-2, p. 706; Trans. p. 227.)

In this memorial reference is made to the Tennessee Act conferring upon the State of Georgia the right to extend her railroad into the territory of Tennessee, and to the reciprocal obligation on the part of the State of Georgia to confer similar privileges on the State of Tennessee or her incorporated companies. It is stated that in accordance with this compact, the State of Georgia had conferred upon the Hiwassee (then the East Tennessee and Georgia) Railroad Company, the right and privilege of extending its railroad from the State line to Dalton, Ga. Attention is then called to the representation that this Railroad Company was being subjected to annoying and harassing suits in the Georgia courts; and to the fact that the East Tennessee & Georgia and other railroads, being the property of incorporated companies, are liable to the restrictions of their charters and amenable to the responsibilities and liabilities of common carriers. The memorial then proceeds:

> "These restrictions and liabilities are conceded to be essential to a just and reasonable protection of rights of persons and property. If by any negligence, inattention, incompetency of officers or agents, or negligence of any kind, the rights or interests of any of your citizens are compromised or sacrificed, the remedy is plain, and the redress easy and certain. *Not so in the case of the Western and Atlantic Railroad. This is exclusively the property of your State. Its property and rights are vested in a sovereignty and consequently exempt from the liabilities that attach to individuals or companies of incorporation.* Should damages result to citizens of your State, or ours, or any of our sister States, what remedy, what redress have we or they now, but such as a sense of justice of the Legislature may accord them, and which, if obtained, must be done with much delay and great expense? Difficulties enough in many instances to amount to a denial of justice, in consequence of the inconvenience of making the application to the only source of redress, the legislative power of your State."

In deference to the eminently proper sentiment that the excellence of State sovereignty should not be permitted to occasion public or private injustice, the State of Georgia undertook to apply a remedy by consenting to a limited liability with respect to transactions and grievances arising out of the operation of the Western & Atlantic Railroad.

Accordingly suits were authorized to be brought against the superintendent of the Western & Atlantic Railroad concerning transactions arising out of the operation of the road in cases where the claim could not be adjusted between the claimant and the superintendent. (Acts of 1851-2, p. 110; Trans. p. 225.)

Thereafter it was further enacted that all laws of force in Georgia, regulating the liability for damage done through the operation of railroads, should apply to the Western & Atlantic Railroad. (Acts of 1862-3, p. 183; Trans. p. 225.)

It is to be noted that the memorial of the Tennessee Legislature, as well as the Georgia legislation above referred to, related wholly and exclusively to matters arising out of the *operation* of the Western & Atlantic Railroad, and had no reference whatever to any limitation upon the rights and immunities of the State of Georgia with relation to its *ownership* of the property.

The State of Georgia has never consented to any modification of the governmental character of her ownership of this property. She has been scrupulous to maintain the integrity of this relation, which has been constantly recognized and preserved from impairment. To no extent has the State ever laid aside her sovereignty with respect to her *ownership* of the Western & Atlantic Railroad.

2. *Operation by Lessee from the State*: On December 27th, 1870, the railroad was leased for a term of twenty

years to certain parties who became incorporated and operated the road under the name of the Western & Atlantic Railroad Company. Upon the termination of this lease, to-wit: on December 27th, 1890, the railroad was leased for a term of twenty-nine years to the Nashville, Chattanooga & St. Louis Railway. This lease will expire on December 27th, 1919. Under date of May 11th, 1917, after this suit had been instituted, the Western & Atlantic Railroad was again leased to the Nashville, Chattanooga & St. Louis Railway for a term of fifty years beginning at the expiration of the present outstanding lease. (Trans. 225-6.)

The rental received by the State under each of these contracts of lease was and is required by law to be paid monthly into the Treasury of the State, one-half thereof to be applied to the support and maintenance of the common schools of the State, and the remainder to general public uses.

The State of Georgia has no interest whatever in the Lessee Company, or its operation of the railroad. The State, however, has continued jealous of its public ownership of the property with respect to which it has constantly maintained its governmental relation.

ARGUMENT.

I.

The use authorized by the Act of 1879, if intended to be exclusive and perpetual, would be the equivalent of a grant of the freehold; if otherwise, it created a revocable license.

The Act conferred upon the Trustees of the Cincinnati Southern Railway "for the use of said Railway the use of" a defined portion of the right of way of the Western & Atlantic Railroad. The use contemplated the occupation of this part of the right of way by the roadbed and tracks of the Cincinnati Southern Railway for the operation of its railway into and out from Chattanooga. The use was in its nature exclusive, and so long as it was rightfully exercised, was inconsistent with any beneficial enjoyment of the particular property by the State.

If this use was intended to be perpetual, as well as exclusive, the grant, if otherwise valid, would amount to a conveyance of the freehold, and not merely to the creation of an easement or other incorporal right or interest in the property. An easement implies a right to a servitude in or upon property, appurtenant to a dominant estate, and must be consistent with a general beneficial enjoyment of the property by the owner of the servient estate; in other words, it is a charge upon the land of another, and not an exclusive appropriation of the land itself in perpetuity.

> "A grant of the exclusive use of land is not an easement, for such a grant excludes the grantor, and is in

practical effect a grant of the soil itself." *Jones on Easements*, p. 12, Sec. 14.

If then the Act is to be construed as granting a perpetual right to the exclusive use of the property, beyond the power of the State to recall, it would be the actual and legal equivalent of a complete alienation of the State's property.

Can such a purpose be fairly attributed to the Legislature, which held this property in trust for the people of Georgia, by whom it had been acquired for and dedicated to a particular use?

On the other hand, if such was not the legislative intent the Act granted nothing more than a provisional use of the property subject to be terminated at the will of the State; in other words, a revocable license.

II.

The Act of 1879, read in the light of surrounding circumstances, manifests an intention to grant a permissive use of the property, and not an indefeasible interest therein.

It appears from the recitals in the Act that the Cincinnati Southern Railway was nearing completion to a connection with the Western & Atlantic Railroad at Boyce station. It also appears that the Cincinnati Southern Railway had located its route from Boyce to Chattanooga parallel to and adjoining that of the Western & Atlantic Railroad.

The building of the Cincinnati Southern Railway was in no way predicated upon nor influenced by the grant of any right or privilege to use any portion of the right of way of the Western & Atlantic Railroad. At the time the Act was passed that Railway had already been nearly completed to a physical connection with the Western & Atlantic Railroad at Boyce station, thereby affording a direct through line between Cincinnati and Atlanta. Hence there was no inducement to the State of Georgia to grant any right in its property in order to secure this connection with the railway systems of the north and west; unless indeed the recital that the Cincinnati Southern Railway would form a most important feeder and practically an extension of the Western & Atlantic Railroad, be taken as a representation and a promise that the two railroads would be so reciprocally operated as to constitute in effect a single through line between Cincinnati and Atlanta.

The State of Georgia was not interested in the building of the Cincinnati Southern Railway from Boyce to Chattanooga, either on its own right of way or on that of the State. It was contemplated that the interchange of traffic between the two roads should be had at Boyce, thereby obviating an unnecessary haul into and out from Chattanooga. Undoubtedly the Cincinnati Southern Railway would have been in the first instance built upon its own right of way but for the grace of the State of Georgia in extending the privilege of the use of the State's right of way. Why then should the State of Georgia give up so much of its narrow right of way for the permanent and exclusive use of the Cincinnati Southern, which was the owner of a much more ample and adequate right of way immediately adjacent?

There were urgent reasons why the Cincinnati Southern desired to provisionally use the right of way of the Western & Atlantic Railroad until its own right of way could be developed and improved. It would thereby gain early entrance into Chattanooga, effect a substantial saving in expense of construction, and gain for its fresh, green embankment the protection of a firmer and stronger road-bed over a route subject to occasional overflow from the Tennessee river. This roadbed could thereafter be more economically extended over and upon the adjoining right of way of the Cincinnati Southern, as its convenience permitted.

The right of way of the Western & Atlantic Railroad, although narrow, was more than at the time seemed necessary for its then present use and operation. The granting of the use of a part of this right of way for the time being, or until the State should desire it for its own use, appeared to be quite the proper thing to do. While the State of Georgia received no benefit therefrom, it did not appear that the Western & Atlantic Railroad would be prejudiced by this temporary use of its right of way.

It must have been recognized that a right of way of only 66 feet would not prove adequate to meet the future demands of two such trunk line railroads in reaching their respective terminals at Chattanooga. Assuredly the State of Georgia could not have intended to permanently confine the Western & Atlantic Railroad to only 42½ feet, or give the perpetual use of the remainder of its right of way to a railroad which owned an immediately adjacent right of way from 100 to 150 feet in width. Such an unnecessary dedication in perpetuity of so large a part of the State's property would have exceeded the bounds of generosity, and could scarcely be characterized as less than prodigal.

The Trustees of the Cincinnati Southern Railway certainly did not expect to limit their Railway to the use of this 23½ foot strip. They undoubtedly intended to build upon their own right of way for the permanent use of their Railway. The event demonstrates the fact of this intention. This right of way of the Cincinnati Southern has been built up and developed, and much of it is now occupied by tracks and yards of the Railway.

It would indeed be attributing an indirect purpose to those Trustees to indulge the thought that they intended to secure this large part of the State's right of way without compensation, and permanently retain it long after the need for its provisional use had ceased.

Suppose the Trustees of the Cincinnati Southern Railway had come to the Legislature of Georgia with a boldly stated proposition like this:

"Our Railway has been nearly completed from Cincinnati to a connection with your Western & Atlantic Railroad at Boyce. It is our intention to build our Railway from Boyce to Chattanooga, and for this purpose we have secured an ample right of way immediately adjoining yours. There is no reason why we should not build upon and occupy our own right of way but for the delay and expense incident to immediate construction. It is true that your right of way is quite narrow, but you are not using all of it. It will be a very great convenience to us if you will give us one-third of your right of way for the use of our Railway. We expect hereafter to develop our own right of way, and will then have, including the strip you give us, an improved road way of 123 to 173 feet in width, being three or four times as wide as that part of your right of way which you retain for your own Railroad. Nevertheless, after this has been accomplished, and our present need for the use of your property has been satisfied, we want to retain the perpetual, exclusive use of this strip in order to avoid the expense of shifting our tracks, rearranging our yards, and extending the viaducts and bridges over our right of way. It is true that the State will derive no advantage from our use of this property unless it be that enlarged embankments may afford some incidental protection against overflow from the Tennessee river. It is true that the Western & Atlantic Railroad already has an old and firmly settled road bed over this route which has proven impervious to serious damage from overflow and flood; nevertheless after our additional construction has become settled and seasoned by age the joint road bed will be even firmer and stronger."

It can scarcely be doubted that the Legislature would have made some such reply as the following:

"We are without power to give away the property of the State or grant a perpetual, exclusive use therein even though some such incidental benefit as you mention may accrue. We, however, feel very kindly towards your enterprise, and are willing to assist you to the extent of your present needs by giving you permission to use our property until you can develop your own, or until the State shall desire to recall the permission."

In this situation can it be supposed that the Legislature, in granting this use without compensation, thought for an instant that it was giving up forever to the Trustees of the Cincinnati Southern Railway, their successors and assigns, more than one-third of the State's property between Boyce and Chattanooga, amounting to something like twelve acres of land? How could such extravagance be so justified as to merit or receive either moral or legal sanction?

III.

The fact that the duration of the use is not specifically limited, does not give rise to the implication that it was intended to be perpetual.

In granting the use the Act does not employ technical terms such as would denote the grant of a legal estate or an indefeasible interest in the property. The words must therefore be given their ordinary meaning, in searching for the legislative intent.

Giving such meaning to the words employed, the Legislature must have thought that in granting the use of the property it was not in effect making a conveyance of the property, but was reserving it to the State, subject only to a limited use. If the use was intended to be perpetual as well as exclusive, then no beneficial enjoyment of the particular property could ever be had by the State, and in effect the reservation intended would have destroyed itself. The rule of reason forbids such construction.

Since the use was in its nature exclusive, the only reservation or limitation that would be of any value to the State necessarily related to the duration of the enjoyment. If it had been intended to grant such perpetual use the purpose would have been expressed in terms that would have made that meaning clear. The grant would not have been qualified by the double employment of the word use, ("for the **use** of said railway, the **use** of" a defined portion of the property). At least the words "perpetual use," or the use "forever," or terms of similar import would have been employed. The omission of any such words is significant of the intention that the grant of the use should be within recall of the State.

No implication that the use was intended to be perpetual arises from the fact that it was not specifically limited in point of time.

The general rule is that the extent and duration of a use in public property cannot rest upon implication, but must be shown to have been expressly granted in plain terms. There is, however, an exception to the rule in cases of grants of use of streets and highways connected with and essential to the exercise of public franchises. The rule and the exception is illustrated in two recent cases in this Court.

In the case of *Northern Ohio Traction Company vs. Ohio*, 245 U. S. 574, it appeared that the County Commissioners had granted to an interurban railway company the right to construct and operate an electric railway along the State highway without specifying any limit as to time. These Commissioners, under the Constitution and laws of the State, were empowered to grant franchises over public roads, valid for 25 years, if not perpetually. Long after the franchise had been accepted and the railway constructed, a dispute arose between the County Commissioners and the Company concerning the rates and fares charged, as a result of which dispute the County Commissioners undertook to revoke the grant. The Court said that the circumstances surrounding the grant showed no intention either to give or accept a mere revocable right. It clearly appeared that the grant was made in order that the Company might exercise its franchise obtained from the State, and that the continued use of the property was essential to the enjoyment of this franchise. The Court said that the County Commissioners having power to make a grant for 25 years, if not perpetually, and use of the highway being essential to the discharge of its corporate attributes by the Railway Company, the grant of the use for at least 25 years would be implied. It was accordingly held that the grant of the use as so construed was a contract not subject to annulment at the will of County Commissioners.

The exception to the general rule upon which that case was decided was declared in the case of the *Seaboard Air Line Railway vs. City of Raleigh*, 242 U. S., 15, as follows:

> "That where general powers are conferred and duties are imposed upon a corporation which from their nature and essential character presuppose the right to exert them or the duty to perform them dur-

> ing a specified time or in perpetuity, and a particular power or right is conferred on the corporation which has a necessary relation thereto or an essential connection therewith, although such particular power or right may not have expressly taken the form of contract or grant for a stated time or in perpetuity, nevertheless such result may be implied by considering the essential relation which the particular power or right granted bears to the general powers and duties possessed and the necessary connection between the two for the purpose of giving a common duration to both."

It appeared in the *Seaboard Air Line* case that the city had granted the Railroad Company permission to occupy the sidewalk of a city street for a track connecting its main line with an adjoining building then used as a cotton compress. The use of this spur track was not confined to serving the cotton compress, but was also employed in the general business of the Company. After the track had been so used for many years the city revoked the right of the Railway Company to the occupation of the sidewalk. The Railway claimed that the right to the use, not being limited in point of time, and having been so long enjoyed, was to be construed as being permanent and irrevocable.

After referring to the general rule and its limitation above quoted, the Court declared:

> "But while the general rule is well founded and the exception or limitation by which it is asserted to be qualified is well settled, it has no relation to the case

in hand, since the particular action of the city in question concerned a mere permission to exercise a facility as a license given long after the creation of the railway corporation and not inherently or in any degree necessarily controlling its power to discharge its corporate attributes."

The construction of the Act under consideration falls within the general rule, and is controlled by the principle applied in the *Seaboard Air Line* case. In that case the city gave permission to the Railway Company to occupy the sidewalk for its spur track. In the instant case the State gave the use of a portion of its right of way for the use of the Railway Company. In neither case was the use granted in any way connected with or essential to the exercise of the public franchise, nor at all essential to enable the Railway Company to discharge its corporate attributes. The adjoining right of way of the Cincinnati Southern was adequate and available; the use of the State's right of way was merely a matter of temporary convenience.

The privilege was personal to the Trustees.

That only a revocable license was intended is further evidenced by the fact that the privilege granted was personal to the Trustees, being to "the Trustees of the Cincinnati Southern Railway for the use of said Railway."

There is a complete absence of any words indicating that the privilege might be transferred or assigned by the Trustees to any other person, or be exercised for the benefit of any other railway. There was persuasive reason why the

State of Georgia should be inclined to look with favor upon the building and operation of this railway by the city of Cincinnati. So long as this railway should be operated by Trustees in behalf of the city, the State of Georgia reasonably anticipated that a reciprocal regard would be had by the city for the railroad owned by the State. There was a good deal of sentiment and personal consideration that influenced the transaction. It was not in the mind of either party that the railway would shortly after its completion be leased to a private railway company with unfriendly affiliations and hostile interests to those of the Western & Atlantic Railroad. An apparent safeguard against the happening of such a contingency as actually occurred was provided by refraining from making the privilege assignable.

IV.

The Georgia Legislature was without power to make a voluntary grant of the State's property, or of any irrevocable interest therein.

A grant by the State of its property, such as that of the Western & Atlantic Railroad, would operate as a conveyance of title, and must be supported by a valuable consideration. The absence of such consideration is cogent evidence that the Legislature did not intend to make any irrevocable grant of this property.

The grant of such property, or any permanent interest therein, is unlike the grant of the use of a highway essential to the exercise of a public franchise. The grant of such a use or franchise is not a nude pact because resting upon a reciprocal obligation to serve the public in carrying on the undertaking to which it relates. *New York Electric Lines vs. Empire City Subway*, 235 U. S. 179.

Different principles apply to the grant of permission to occupy property by a railway company in order to enable it to exercise a facility not inherently or in any degree necessarily controlling its power to discharge its corporate attributes. *Seaboard Air Line Ry. vs. City of Raleigh*, 242 U. S. 15.

The General Assembly of Georgia was prohibited by the State Constitution from making voluntary grant or donation of the State's property. Paragraph 1, Section 16 of Article VII of that Constitution in force at the time of the Act of 1879 was passed provides as follows:

> "The General Assembly shall not by any vote, resolution or order, grant any donation or gratuity in favor of any person, corporation or association."

This language is very broad and comprehensive, and was intended to remedy an evil that existed in the earlier history of the State when donations or gratuities were not infrequent.

A mere permissive use of the State's property would not offend this Constitutional provision, since such use could be recalled whenever so desired. The contrary is true with respect to the grant of the property, or any indefeasible interest therein.

A grant of a permanent interest in property implies the exercise of the same power as a grant of the property itself. Clearly the Legislature could not convey away the State's property without a valuable consideration; for to do so would be the equivalent of a donation or gratuity. This being true, the Legislature was equally without power to convey any irrevocable right to the perpetual use of the property, whether technically more or less than an easement.

Not only this, there is even further restriction upon the power of the Legislature to alienate or dispose of the property of the Western & Atlantic Railroad, or any part thereof.

Paragraph 1 of Section 13 of Article VII of the Georgia Constitution in force at the time is as follows:

> "The proceeds of the sale of the Western and Atlantic, Macon and Brunswick, or other railroads, held by the State, and any other property owned by the State, whenever the General Assembly may authorize the sale of the whole, or any part thereof, shall be applied to the payment of the bonded debt of the State, and shall not be used for any other purpose whatever, so long as the State has any existing bonded debt: Provided, that the proceeds of the sale of the Western & Atlantic Railroad shall be applied to the payment of the bonds for which said railroad has been mortgaged, in preference to all other bonds."

The provision that the proceeds of the sale shall be applied to the specific purpose named is the equivalent of a prohibition of a sale of any part of the Western & Atlantic Railroad or any other property of the State, except for a consideration that may be applied upon the payment of the bonded debt of the State. Hence even a valuable consideration, such as might support a private contract, would not suffice to devest the title of the State unless capable of being reduced to such form as could be applied to the specific use directed.

In this case there is no semblance of any such consideration claimed in support of the grant to the Trustees of the Cincinnati Southern Railway.

The Constitution containing the provisions above quoted was adopted only two years prior to the passage of the Act of 1879, and must have been fresh in the minds of the members of the General Assembly. Doubtless the Trustees of the Cincinnati Southern Railway consulted the Constitution and laws of the State before asking for the grant of any right or privilege to use the State's property. Whether or not this was true in fact all persons were charged with notice of the law, and all dealings affecting the property of the State were made subject thereto. While the General Assembly is vested with the full legislative power of the State, it is as strictly bound by any constitutional limitation as any other branch or agency of the State government.

The just inference is that the Legislature never intended to exceed its power by undertaking to make any irrevocable grant of the State's property; and that the Trustees of the Cincinnati Southern Railway knew or were charged with notice that the Act could lawfully convey nothing more than a permissive use, subject to recall at the will of the State.

There is nothing in the case of *Fletcher vs. Peck*, 6 Cranch. 87, that is inconsistent with or qualifies in any degree the propositions we assert. We recognize as established law that a valid grant of property by a State is a contract falling within the protection of the contract clause of the Federal Constitution. That is the principle decided in that case. The other questions were not novel, nor does the decision otherwise furnish any new precedent. This Court found that the Legislature of Georgia had power to make the grant in question, which was in fact made upon a valuable consideration. It is true that it was claimed that the Legislature of Georgia was improperly—perhaps fraudulently—influenced to make the grant; but this Court pointed out that the State of Georgia was not a party to the case, and had not undertaken to annul the contract, nor did it appear that the State was dissatisfied with the sale that had been made.

V.

The recitals of the Act express no consideration for a grant of the property.

Whether in the absence of an express constitutional limitation the Legislature may voluntarily alienate the property of the State, need not be here considered. It would seem that in any event the Legislature is to be regarded as the trustee for the public, and as such forbidden under general constitutional principles from dissipating the property of the State. The Legislature should, in the exercise of a wise public policy grant public franchises and permit the use of public property essential to their enjoyment; but as has been shown, such grants rest upon different principles, and are not without consideration.

Certain it is that the Legislature of Georgia is expressly forbidden to make a voluntary grant of the State's property, and hence any such grant must be shown to be supported by a valuable consideration. The Act upon its face expresses no such consideration.

While there is technically no preamble to the Act, since its entire body follows the enacting clause, there are nevertheless certain recitals of fact which precede the grant of the use. These recitals express the motive or inducement influencing the grant of the right or privilege, and are therefore in the nature of a preamble, and may be considered as such. The preamble has been said to be a key to open the understanding of a statute, and may be looked to in order to discover the Legislative purpose and intent. *Coosaw Mining Co. vs. South Carolina,* 144 U. S. 550; *Johnson vs. So. Pacific Co.,* 196 U. S. 1.

The preamble to this Act contains two recitals apparently intended to influence the passage of the Act, as follows:

(a) That the Cincinnati Southern Railway would form a most important feeder and practically an extension of the Western & Atlantic Railroad, which was the property of the State; and

(b) That the building of the Cincinnati Southern upon the right of way of the Western & Atlantic Railroad would give the advantage of a stronger and firmer roadbed through a route subject to overflow by floods in the Tennessee river.

Neither of those representations constituted a present consideration, but each was wholly prospective of incidental benefits that might accrue to the State of Georgia as the owner of the Western & Atlantic Railroad. If either was intended to express a consideration, both would fall into the same category. If, on the other hand, one was merely a statement of the motive prompting the Act, so was the other.

The difference between a moral inducement and a legal consideration must not be overlooked. In *Philpot vs. Gruninger*, 14 Wall. 570, it was said:

> "It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce the entering into a contract, and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promissory undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is the cause or meritorious occasion requiring a mutual recompense in fact or in law."

A contract which, as between individuals would be a nude pact, is of no higher character because one of the parties is a State and the other a corporation, and the contract takes the form of a statute. If the contract (such as the limited grant of exemption of the land of a railway company from local taxation) is without consideration, it is the promise of a gratuity which may be kept, changed or recalled at the pleasure of the State. *Tucker vs. Ferguson*, 22 Wall. 527.

The recital that the Cincinnati Southern was nearing completion, and reached the Western & Atlantic at Boyce Station, was the statement of an existing fact, which could not operate as a valuable consideration for a grant from the State; nor was anything else necessary to be done to afford a physicial connection between the Western & Atlantic Railroad and the railway systems of the north and west converging at Cincinnati. The representation that the Cincinnati Southern Railway would form an important feeder and a practical extension of the Western & Atlantic Railroad was purely prospective and conjectural. It doubtless was a moral inducement that sentimentally appealed to the generosity of the Legislature; but it is lacking in all of the elements of a valuable consideration.

So the statement that the location of the "tracks and works" of the Cincinnati Southern Railway close to those of the Western & Atlantic Railroad would give to both roads the advantage of a stronger and firmer roadbed over a route subject to overflow, does not express a valuable consideration to the State for a grant of her property. It is not stated, nor does it appear (unless by implication) either (a) that the Western & Atlantic Railroad had in the past suffered material damage from floods in the Tennessee river, or (b) that the firmer and stronger roadbed which might result from the joint construction would afford any more protection against such floods, than would have accrued from a roadbed separately built on the immediately adjacent right of way of the Cincinnati Southern Railway.

All of the benefits were to accrue to the Cincinnati Southern Railway. It was to have the exclusive use and enjoyment of one-third of the State's right of way for a distance of several miles. In addition to the value of the use itself, there would be a great saving in the expense of construction. The additional roadway, built upon and supported by the old and firmly settled roadbed of the Western & Atlantic Railroad would itself be the beneficiary of any advantage and protection therefrom.

For all of this the Cincinnati Southern was not to pay one penny in value, either in money or in property, or in the use of any of its facilities by the Western & Atlantic Railroad. The Trustees of the Cincinnati Southern parted with nothing, nor incurred any expenditure except for their own benefit and advantage. To say that such expenditures constituted a valuable consideration for a grant of the land itself, would be a contradiction in terms. These trustees promised to do nothing for the benefit of the State of Georgia or her railroad. They did not even so much as undertake to protect the roadbed of the Western & Atlantic Railroad from damage by flood if such was or should become necessary. All they were to do was to adapt a portion of the right of way by the Western & Atlantic Railroad to and for the exclusive use and enjoyment of their own railway. Even if some incidental benefit accrued to the State therefrom in the matter of greater protection in times of flood, it constituted no such valuable consideration as would support a perpetual grant of the property. The Trustees could not avail themselves of the permission to use the State's property, without at the same time causing such incidental benefit to accrue to the State as might naturally flow therefrom. In other words, any such resulting benefit would have been incidental to and not a consideration for the use granted.

This argument is directed to the proposition that the Act upon its face does not express a valuable consideration. We will later discuss the evidence which shows that in point of fact the Western & Atlantic Railroad neither needed nor received any protection or benefit from the building of the Cincinnati Southern upon its right of way.

The representation that the City of Cincinnati had nearly completed this "grand trunk line" appealed to the imagination of the Georgia Legislature as being in part a realization of the early dream of a great highway connecting the west and the south, and inclined that body to a generous regard for the convenience of this railway pending its final completion. In this we find the inspiration that induced the Legislature of Georgia to grant a permissive use of the State's property. There was no thought of any valuable consideration to the State upon which a grant of the property or a perpetual use therein could be predicated. The expectation of results—that the Cincinnati Southern would become an important feeder of the Western & Atlantic Railroad, and that some incidental benefit might accrue from the occupation by it of the State's right of way—may have inclined the Legislature to the passage of the Act, but neither the expectation nor the result measured up to the requirement of a valuable consideration for a grant of the property of the State; and thus we find that the motive influencing the passage of the Act does not furnish a valuable consideration in support of a grant.

VI.

The State of Georgia received in fact no such benefit or advantage as would afford consideration for a grant.

1. The recital in the Act that the Cincinnati Southern Railway would become an important feeder and practically an extension of the Western & Atlantic Railroad, if treated as a representation, cannot be regarded as in any sense a legal consideration, nor was it in fact of any benefit to the State because it was never regarded in the practical operation of the Railway. The evidence so completely demonstrates the truth of this assertion that repetition would be tiresome and discussion superfluous. Indeed, the fact is that the Cincinnati Southern Railway and its lessee, so far from treating the Western & Atlantic Railroad as a preferred connection, has at least for many years purposely excluded it from all traffic within the control of The Cincinnati, New Orleans & Texas Pacific Railway. This Railway, as a part of the Southern Railway System, has been operated in competition with and antagonistic to the Western & Atlantic Railroad.

If this representation was intended as a consideration it never came into being, or has completely failed; if it was offered as a moral inducement, its violation has been flagrant. This is so obviously true that the defendants apparently would have this recital in the Act entirely ignored. And yet the expression of this glittering generality, if it had any purpose at all, must have been intended to influence the passage of the Act by the Georgia Legislature; at least as much so as the companion recital of the incidental benefit by way of protection against overflow that would result from the building of the Cincinnati Southern on the right of way of the Western & Atlantic Railroad.

2. The defendants, however, illogically ignore the one recital and plead the other as a valuable consideration. They say in their answer that the protection and advantage resulting to the State of Georgia from the building of their Railway upon the right of way of the Western & Atlantic Railroad was of the utmost value, and was and is a valuable consideration for a grant of a perpetual use of the property.

We have undertaken to show that the recitals in the Act on this subject do not express a legal consideration such as would support a grant of a perpetual use in this property by the Legislature of the State of Georgia; and that the recital, whether or not well founded in fact, was neither intended nor accepted as a valuable consideration.

We will now undertake to show that in point of fact this occupation by the Cincinnati Southern Railway was and is of no value to the State, and has afforded no protection to the Western & Atlantic Railroad against damage from overflow and flood in the Tennessee river.

We submit that the evidence establishes the following propositions:

(a) That damage to the Western & Atlantic Railroad from floods in the Tennessee river had in the past been so infrequent and so inconsequential as not to reasonably call for any further protection.

(b) That the building of the Cincinnati Southern Railway upon this right of way added nothing substantial by way of protection against overflow or flood.

(c) That the consequences of overflow and flood, in so far as concerns the Western & Atlantic Railroad, would have been the same had the Cincinnati Southern Railway been built on its own adjoining right of way.

The Western & Atlantic Railroad had been originally constructed along this route about thirty years prior to the passage of the Act of 1879. Its roadbed was built of clay, and had become firmly settled. Being thus thoroughly seasoned by age and use it had become impervious to saturation and disintegration from the action of back water without current. It was only after the river reached a tide of fifty feet or more, and a strong current set in, that any damage is shown to have occurred, and this on only two occasions—in 1875 and 1886—although it is reasonable to presume that the flood of 1867 also caused some damage.

Owing to the topography of the country the current in these times of flood crossed over the roadway and tracks of the Western & Atlantic Railroad in the immediate vicinity of the National Cemetery. The damage was confined to the width of the current at that point. At no other place between Boyce and Chattanooga has any damage to either embankment or roadway been shown to have been occasioned by overflow, even in times of the highest flood tide.

The evidence establishing these facts is indisputable in its character. Never, within the memory of any living witness, has any damage to this embankment and roadway been occasioned by overflow, excepting in periods of flood referred to, and then only at the point where the current crosses near the National Cemetery.

Thus, Mr. Nixon, who had been living in Chattanooga since 1870, stated his observation and information to be that this roadway was never affected until the water reached the flood stage of fifty feet; and that excepting in times of such flood the roadway and embankment along by the National Cemetery had withstood the action of the water without damage, as far back as he could recall. (Trans. 164.)

Mr. Hunter McDonald, Chief Engineer of the Nashville, Chattanooga & St. Louis Railway, who, since 1891, has been the engineer in charge of the maintenance of way of the Western & Atlantic Railroad, and whose knowledge of this roadway dates back to 1879, had never observed any injury at all occasioned by such overflow. (Trans. 60.)

The high water in 1917, which came within two or three feet of reaching flood stage, and which completely submerged the right of way and surrounding country, produced no appreciable damage.

From these facts it is obvious that whatever damage may occur results from the scouring of the surface occasioned by the draft of the overhead current. The testimony of the witnesses is entirely consistent with scientific deduction from the physical facts. The slope of this embankment had been subjected to occasional overflow for many years, and, being of clay, had become thoroughly compacted. The backwater slowly coming in on the southerly and easterly side found its way through culverts to the other side of the embankment, and thus rose evenly and without current on each side. The water in its recession was equally gradual and without current. It is therefore quite readily perceived that such back flow did not and could not occasion any appreciable damage to this embankment and right of way of the Western & Atlantic Railroad.

The damage shown to have resulted from the flood tides in excess of 50 feet was confined to the surface of the roadway within the path of the current where it crossed over the tracks along and near the National Cemetery. No damage to the sides of the embankment occurred even in these times of flood, excepting some sloughing of the slope of the embankment on the Cemetery side of the Western & Atlantic Railroad.

The only witness who testified from personal observation concerning the flood of 1875, says that the ties and tracks were undermined and the top, or the surface, of the roadway was considerably washed.

During the flood of 1886 the damage was similar in character and extent. The surface of the roadway suffered damage; there were wash-outs under the ties, and the tracks of the Cincinnati Southern were torn up and thrown over on that portion of the roadway occupied by the Western & Atlantic Railroad. There was also some damage to the tracks of the Western & Atlantic road, and to the embankment on the Cemetery side. There was no damage to the embankment on the side occupied by the Cincinnati Southern Railway.

Again we find that consideration of the physical facts would lead us to expect damage of the character testified to by the witnesses.

Let it be remembered that before the current sets in the roadway and tracks are completely submerged to a depth of several feet, and the surrounding country is likewise overflowed to the same height or level. There is thus created a level plane of still water over which the current sweeps to and across the railroad tracks opposite the Cemetery. Being thus entirely submerged, the slope of the embankment is not exposed to the force of the current, which flows over the roadway at a higher level.

As this current passes over the roadway to the lower level beyond, the draft or suction thus created is sufficiently strong to scour or wash the underlying surface; and as the flood subsides the effect of this force is extended to the slope of the embankment on the lower side of the roadway.

The force of a current is always in the direction in which it is moving, hence an embankment on the side from which the current flows is not exposed to the action of this force in the same way or in like degree as is the slope of the embankment on the far side. It is further true that the embankment, being entirely submerged, to no extent breaks the force of the current or offers any protection to the surface of the roadway or the slope of the embankment beyond.

From these facts the conclusion follows that the widening of the roadbed afforded absolutely no protection to the Western & Atlantic Railroad against floods in the Tennessee river. This added width of the same grade level merely extended the surface of the roadway, and was in no sense either a bulkhead or a break-water. It could have no effect whatever in checking or diminishing the force of the current. In fact there neither was nor is any way of preventing damage to the surface of the roadway from the effect of these flood tides by any sort of addition to the embankment either in height or breadth or other device. There is no way by which the current could be prevented from sweeping over and across the roadway, thereby occasioning consequental damage to its surface. The topography of the country is such that the current could not be diverted and carried around this roadway. To the extent that the surface of the roadway would be damaged as a result of these flood tides, it is a natural exposure that can be neither remedied nor avoided.

These things being true, the building of the Cincinnati Southern on this right of way neither did nor could add anything whatever by way of protection to the Western & Atlantic Railroad.

Had the Cincinnati Southern Railway been originally built upon its own adjoining right of way, the consequences, in so far as concerns the effect of overflow and flood upon the Western & Atlantic Railroad, would have been precisely the same. In times of overflow less than 50 feet, the Western & Atlantic Railroad embankment, being already impervious to the action of such back-flow, would have been in no way affected by the neighboring construction. In times of flood after the current had set in, both embankments being completely submerged, that of the Cincinnati Southern would have offered no resistance to the force of this current; nor would it in the least have increased its force. Its effect would have been nil.

Should the Cincinnati Southern have been built on a grade above the flood tide level and above that of the Western & Atlantic Railroad it might have acted as a break-water, and in that way have afforded some protection. There is no evidence, however, that any such high grade would have been adopted, and the topography of the country repels any suggestion that it would have been.

So long as the embankment of the Cincinnati Southern was fresh and green it would have been liable to disintegration from the ordinary back-flow, and subject to be swept away in times of flood. During these times and to this extent the old and firmly settled roadbed of the Western & Atlantic Railroad was a material protection to that of the Cincinnati Southern Railway.

VII.

No adverse right in the subject matter was acquired by use and occupation.

Whatever use and occupation the defendants have maintained was pursuant to the privilege granted by the State.

The use has been to no extent adverse, under claim of right other than that granted by the Act of 1879. With respect to the occupation of that portion of the right of way defined in the Act, the defendants in their answer aver that they have ever since been "in open, notorious, continuous, and adverse possession of the same **under said grant.**" (Trans. p. 22, 23.) The use and occupation had, being thus under claim of authority from the State, cannot, of course, be adverse.

That possession under a license or other claim of right or privilege cannot ripen into a prescriptive title against the grantor, is a proposition that need not be argued to this Court; the mere statement is its own demonstration. No matter how long and continuous the occupation may have been, it cannot amplify the authorized use, or change its character from that of a mere license into a permanent right. As was said by the Chief Justice in the *Seaboard Air Line* case (242 U. S. at page 19):

> "The contention that . . . . in as much as the railroad had for a long time operated the spur track on the sidewalk and used it for its general railroad purposes with the assumed knowledge and assent of the city, thereby the existence of a contractual and permanent right must be inferred, is manifestly without merit. Indeed it amounts to saying that possession under a mere license was capable of causing that which was revocable and precarious to become contractual and permanent."

With respect to the lesser encroachment extending 1750 feet from near the interlocking tower on the east side of the right of way, the defendants do now set up a claim of title by prescription. Concerning this occupation the defendants allege in their answer that when the main track of the Cincinnati Southern was constructed on the west side of the Western & Atlantic right of way the terminals of the Cincinnati Southern at Chattanooga were located on the east side of this right of way; and that in order to reach these terminals it was found necessary to construct the main line of track across that of the Western & Atlantic, and from thence along on the east side of this right of way for the distance named, the width of this occupation being 23½ feet. (Trans. 24.)

The evidence shows that the occupation of the east side of this right of way was coincident with and a continuation of that of the west side. Apparently the Trustees of the Cincinnati Southern Railway when asking the privilege to use this right of way overlooked the fact that it would be necessary to cross over and occupy a portion of the east side in order to reach their terminals. It seems to have been assumed that it was immaterial to the State of Georgia which side of the right of way should be used, provided the occupation was limited to the width of 23½ feet; and this was probably true since the privilege, being subject to recall, could be withdrawn whenever the pleasure or the interest of the State so required.

If, therefore, it could be said that this occupation was with the knowledge and consent of the State, as charged by the defendants in their answer, such consent was the equivalent of a parol license.

The decisions of the Tennessee Courts are in accord with the principle that use and possession by permission are not adverse, and can give no right by prescription. *Memphis vs. Lenore*, 6 Coldw. 412; *Connor vs. Frierson*, 98 Tenn. 184; *Henderson vs. Alloway*, 3 Coopers Chan. 688.

There is an utter absence of allegation or proof that the State of Georgia ever had any intimation that the Trustees of the Cincinnati Southern Railway were making any adverse claim of right to this use, or any reason to believe that such claim was intended to be asserted by these Trustees.

The defendants introduced several old employees of the Railway Company for the purpose of showing that at the time of the original construction of the Cincinnati Southern into Chattanooga the freight terminals of that Railway were located on the east side of the Western & Atlantic Railroad, and that the tracks were then laid and since have been maintained on that side of the Western & Atlantic right of way;—a fact that nobody disputed. Beyond this there is not a scintilla of evidence of adverse possession under claim of right. None of the witnesses knew under what, if any, authority the right to this occupancy was claimed; their knowledge was exhausted with a recital of the physical fact.

It is worthy of comment that no testimony whatever was offered by the defendants concerning the character of the claim of either of them—that is to say, whether adverse or under claim of authority from the State. Counsel for the State sought to bring out the fact in his cross examination of Mr. Curtis Daugherty, Chief Engineer, Maintenance of Way, Southern Railway System, Lines West, who for eighteen years had been Chief Engineer of the Cincinnati, New Orleans & Texas Pacific Railway Company. The character and value of this evidence can best be shown by a literal quotation:

Q. Now, referring to this strip on the east side of the Western & Atlantic Railroad right of way in and near the city of Chattanooga, occupied by the Cincinnati Southern, is the right to occupy this strip claimed by The Cincinnati, New Orleans & Texas Pacific Railway Company, or is it claimed by the Trustees of the Cincinnati Southern Railway?

A. I found when I took charge of the maintenance of tracks of The Cincinnati, New Orleans & Texas Pacific Railway Company, and still find this strip of land occupied by the tracks that belong to the, or at least are operated by The Cincinnati, New Orleans & Texas Pacific Railway Company. That is evidence to me that the tracks,—that those tracks are tracks of The Cincinnati, New Orleans & Texas Pacific Railway Company. What claim the Cincinnati Southern, or the Trustees thereof, either or both of them, make with reference to that particular strip of land, I am not informed.

Q. You, then, do not know whether the Trustees of the Cincinnati Southern claim the right to occupy that property and The Cincinnati, New Orleans & Texas Pacific occupies that as lessee of the Trustees of the Cincinnati Southern, or the C. N. O. & T. P. claims as an independent right?

A. No, I am not informed on that point. I just found the tracks there.

Q. Then you do not know if this possession of this property may have been during a series of years based on a claim of right?

A. Well, I know that it has been in the possession of The Cincinnati, New Orleans & Texas Pacific since my first acquaintance with it.

Q. You do not know whether they claim an independent right to use it aside from being lessee of the Cincinnati Southern?

A. I have not been informed on that point.

Q. Do you know by what authority The Cincinnati, New Orleans & Texas Pacific Railway Company occupies that right of way to which I have referred?

A. No, I do not.

Q. Is the right claimed either in behalf of the Trustees of the Cincinnati Southern or in behalf of The Cincinnati, New Orleans & Texas Pacific Railway Company, that it passed under this Act of the State of Georgia of October 8th, 1879, to which we have referred?

A. I don't know.

Q. Was any authority claimed to have been granted to either the Trustees of the Cincinnati Southern or The Cincinnati, New Orleans & Texas Pacific Railway Company to occupy this strip, by the lessee of the Western & Atlantic Railroad?

A. I do not know.

Q. Did I understand you to say that this east side of the right of way was necessary to be used in order to reach your terminals, or certain of your terminals, perhaps?

A. I said it was used in connection with reaching those terminals.

Q. Is it reasonably necessary for that purpose?

A. I think so.

Q. Well, if that be true, do you know why the Trustees of the Cincinnati Southern did not ask the State of Georgia for authority to occupy that portion of this right of way?

A. I can only surmise as to the reason why the Trustees did not make any such application.

Q. Of course I do not want pure surmise, but any deductions from facts I would be glad for you to state?

A. I can only judge from the situation as I see it now, that they probably overlooked it." (Trans. pp. 197-8.)

On redirect examination by counsel for the defendants Mr. Daugherty further testified, as follows:

Q. Whatever possession The Cincinnati, New Orleans & Texas Pacific has to any property of the Cincinnati Southern Railway is by virtue of a lease, it is not, from the Cincinnati Southern Railway Trustees to the C. N. O. & T. P. Railway Company?

A. Yes, sir.

Q. It does not claim to own anything except under the Cincinnati Southern Railway, except by virtue of that lease, does it?

A. Not so far as I am advised. (Trans. 204.)

From this it would seem that The Cincinnati, New Orleans & Texas Pacific Railway Company claims no right to this use, excepting such as may have accrued to it in virtue of the lease from the Trustees of the Cincinnati Southern Railway. So far as those Trustees are concerned they do not offer one particle of evidence to indicate whether they claim under authority from the State, or adversely to the State.

We respectfully submit that such wavering and infirm statements are insufficient to predicate a claim of title by prescription. The burden was upon the defendants to affirmatively show not only open and continuous occcupation, but that such possession was also adverse and under claim of right, other than authority or permission from the State.

No prescription under Tennessee Statutes.

There is lacking another factor essential to a prescriptive title under the law of Tennessee. The defendants in their answer set out and rely upon Sections 4456, 4457 and 4458 of Shannon's Code of Tennessee. (Trans. pp. 24-5.)

In order to acquire a possessory title under the requirements of these Sections there must be seven years adverse possession under color of title purporting to convey an estate in fee; and such conveyance, devise, grant or other assurance of title must have been recorded in the registrar's office for the county in which the land lies during the full term of the seven years' adverse possession.

The defendants in this case assert no claim under color of any assurance of title, either recorded or unrecorded. The utmost they can claim is a physical appropriation of this part of the property of the State of Georgia without any claim of right therefor, unless it be under the Georgia Act of 1879; and this, of course, would defeat any claim of prescriptive title.

No permanent right in this property or its use in favor of the defendants, or either of them, has arisen by estoppel. If the right to the use is claimed under the Act of 1879 then the character and extent of that use is measured by that Act, and is not to be amplified by the mere exercise of the use for a long series of years.

The fact that the defendants may have made large expenditures and improvements on the property does not create an estoppel. The principle that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another to suppose himself to be the owner, to make expenditures, cannot be invoked by one who at the time was acquainted with the character of his own title, or the fact that he had none. *Steele vs. St. Louis S. & R. Co.*, 106 U. S. 447. When the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel. *Brant vs. Va. Coal & I. Co.*, 93 U. S. 326.

The doctrine that prescription does not run against the State, and that the principles of equitable estoppel do not apply with respect to property owned and enjoyed by the State in its governmental capacity, are too well established to require either argument or the citation of authority.

If, then, as we shall presently argue, the Western & Atlantic Railroad is owned by the State of Georgia in such public capacity, then it follows that neither prescription nor estoppel can be invoked in derogation of the State's title to and ownership of the Western & Atlantic Railroad.

VIII.

To provide the means of railway transportation through ownership of its instrumentalities is essentially a governmental function.

It has often been said that transportation is a governmental function. It would perhaps be more historically accurate to say that the provision of the means of transportation is a governmental function. From time immemorial it has been considered the function of the State to provide public highways for travel and traffic. In England and America the exercise of this function came to be in large part delegated to chartered companies, upon whom this public franchise was conferred.

In the initial stage of their history in England it was assumed that railroad companies would merely own the track they provided, charging certain tolls to carriers who would furnish their own vehicles. In 1823 authority was first given to railway companies in England to further supply motive power and to charge therefor a locomotive toll in addition to the road toll. Fifteen years later it was still assumed that "engines belonging to different parties, coach proprietors and others" would operate over the roadway in competition with the railroad company. (Railways and their Rates, by Edwin A. Pratt, London, 1905).

Such was the prevailing notion of the function of a railroad company in America also. In the early days—from 1828 to 1835 and later—the charters of railroad companies —such as the Baltimore & Ohio, the Georgia Railroad & Banking Company, and many others—provided for use of the railroad tracks by the vehicles of others. It was not until some years later that the railroad companies became common carriers and assumed the exclusive use and operation of their railways.

The construction and ownership of a railroad by a State as a means of internal transportation is essentially a matter of governmental concern. In this respect it is not unlike other highways, such as turnpikes or canals constructed at public expense and devoted to the use of the public.

An allustration is found in the ownership by the State of Ohio of its system of canals connecting the waters of Lake Erie with those of the Ohio river. One of these navigable highways was the Miami and Erie canal. In the case of the *State vs. Railway Co.*, 37 Ohio St. Rep. 157, it appeared that a county board of supervisors had assumed to grant to a railway company a right to use one of the banks of this canal for a permanent right of way. The Court pointed out that the canal had been built by the State of Ohio at great expense on lands acquired by the State for the purpose, and had since been owned and maintained by the State. With respect to the character of the State's ownership the Court declared that the relation was that of governing and supervising trustees for the public, and that the property was "held in trust, protected and maintained by the State in its sovereign capacity" as a great navigable highway. It was held that the board of supervisors had no power to grant to the railroad company the right to occupy a bank of this canal, in the absence of express and particular authority to do so, even though the board had general authority to grant to railroad companies the use of "any public road, street, alley, way or ground of any kind."

In the case of *Burbank vs. Fay*, 55 N. Y. 57, the governmental ownership of the Erie Canal by the State of New York was recognized, and it was consequently held that no adverse right could arise from the long continued use of the water by private persons.

Like principles apply to the ownership of the Western & Atlantic Railroad by the State of Georgia.

IX.

The proposition that with respect to the ownership of the Western & Atlantic Railroad the State of Georgia possesses the attributes and enjoys the immunities of State sovereignty, has received the sanction of judicial approval.

The relation of the State of Georgia to her Western & Atlantic Railroad has several times been the subject of judicial consideration, both in Georgia and in Tennessee.

The Georgia decisions clearly establish that even with respect to the operation of the railroad the State enjoyed the immunities attaching to sovereignty, and was not subject to the liabilities of common carriers. When the State consented to suits against the superintendent of the road on account of transactions arising out of its operation, this was regarded as a great concession, not to be extended to embrace other causes of action.

In so far as concerns the State's title to and ownership of the property in her governmental or sovereign capacity, the proposition is established beyond doubt or cavil by the Georgia decisions; nor do we believe that there can be found a decision of the Tennessee Supreme Court to the contrary.

There appears to have been no case affecting the character of the Western & Atlantic Railroad until after the Act of 1851, conferring the privilege of suit in a limited class of cases. The fact that the State could not be held to any legal liability seems to have been universally recognized.

The first case was that of *Macon vs. Cooper*, 19 Ga. 543 (1856). The Court pointed out that in the absence of the statute no right to legal redress existed, and that he who would maintain a suit must bring himself within the express terms of the statute. The Court said:

> "It is an Act of great condescension for the State to disrobe itself of its sovereignty and litigate in its own Courts with a private individual upon terms of perfect equality. Surely the party under such circumstances should comply strictly with the terms of the Act."

In *Walker vs. Spurlock*, 23 Ga. 436 (1857) it was held that an Act defining the liabilities of the several railroad companies within the State for injuries to persons and property, did not apply to the Western & Atlantic Railroad, concerning whose operation the State had consented to only a limited liability. The Court said:

> "The Western & Atlantic Railroad is not a railroad company. That railroad is a piece of property owned by the State, and administered by the agents of the State, * * * * the general rule is that when the State is the party doing the injury there is no judicial remedy of any sort. The State cannot be sued. This is the general rule."

In *Western & Atlantic Railroad vs. Carlton*, 28 Ga. 180 (1859), The Court recognized the principle that in so far as concerns transactions arising out of the operation of the road the State should be subject to the same liability as that of private corporations. It is said that for wrongs and injuries sustained at the hands of the agents of the State in conducting the business there may ordinarily be difficulty in regard to the remedy. The Court points out that in England the remedy is by petition to the King in his Court of Chancery where the remedy is administered as a matter of grace, and that in Georgia the usual course has been by petition to the Legislature. The Act of 1851, permitting suits against the State with respect to matters arising out of the operation of the road, was at that time in force, and the Court commends the Legislature for having provided for suits of this character.

In *Dobbins vs. Railroad Co.*, 37 Ga. 240 (1867), the question was whether the superintendent of the Western & Atlantic Railroad was liable to process of garnishment. The Court thought it manifest that the superintendent belonged to that class of public agents like the Governor and Treasurer of the State, who, as such agents, were exempt from garnishment, and said:

> "It should be borne in mind that the Western & Atlantic Railroad is not a corporation and liable like other corporations to suits and garnishments. It is solely the property of the State of Georgia, under control and power of the Legislature at all times."

The case of the *State vs. Dickson*, 38 Ga. 171 (1868), was one in which the State claimed and was allowed a preference over a mortgage creditor with respect to an indebtedness due the Western & Atlantic Railroad. The Court held that the Western & Atlantic Railroad, being the exclusive property of the State, its income was a part of the public revenue, and that a debt due the road is a debt due the public, and is to be paid before any other debt, lien or claim whatsoever, excepting funeral expenses. The Court said:

> "As the road is the property of the State, and its income just as much a part of her revenue as taxes collected by her, it seems that these Acts (which gave such preference) are simply declaratory of what the law was prior to their passage."

In the case of *Scofield vs. Perkerson*, 46 Ga. 350 (1872), it was again declared that the income of the Western & Atlantic Railroad was a part of the public revenue, and all debtors of the Western & Atlantic Railroad were debtors to the State or public, and that the remedy against the agents of the State in charge of the road was the same as that against tax collectors or receivers. In this case it is said:

> "The principle is that the State must collect her revenue for the support of the government through the action of the executive department thereof, whether derived from taxes or from her other sources of revenue, without any judicial interference therewith."

Each of the foregoing cases arose during the period when the railroad was under State operation. On December 27th, 1870, the Western & Atlantic Railroad was leased to and thereafter was operated by a private company, in which the State had no interest.

Dougherty vs. Western & Atlantic R. R. Co., 53 Ga. 304 (1874), was a suit brought by an adjoining proprietor against the Lessee Company, in which was involved the true boundary of the right of way of the Western & Atlantic Railroad. The plaintiff claimed under a subsequent deed from the State's grantor, accompanied with the claim of many years possession thereunder. The Court held that no possession of or domination over a portion of this right of way could affect the State in so far as concerned its right and title thereto. In this connection it was declared:

> "No statute of limitation or prescription ran against the State so as to be a bar."

That prescription does not run against the State of Georgia with respect to the Western & Atlantic Railroad, was also expressly decided in two cases by the Supreme Court of Georgia at the September term, 1881. In *Glaze vs. Western & Atlantic Railroad Co.,* 67 Ga. 761, the Court declared:

> "No prescription runs against the State, and this is true of the State's title to the Western & Atlantic Railroad, as well as the balance of the public domain, and it does not matter whether the road was for the time being in the hands of the State's own officers or her tenants or lessees."

In the companion case of *Kirschner vs. Western & Atlantic R. R. Co.,* 67 Ga. 760, the Court followed the ruling in the *Glaze* case, and again declared that no prescription runs against the State in any case.

A recent and unequivocal affirmation of this doctrine is found in the case of *Norrell vs. Augusta Ry. Co.*, 116 Ga. 313, wherein the Court, upon authority of the *Glaze* and *Kirschner* cases, supra, declared:

> "That prescription does not in any case run against the State itself is no longer open to question."

In that case the doctrine was extended and made to apply to the use of a city street. It was accordingly held that where a certain strip of land was conveyed to the city for use as a public street, and the authorities accepted the deed but opened and used only one-half, longitudinally, of the land, adverse possession of the remainder by a private individual cannot ripen into a prescriptive title, although such possession is under a deed from the dedicator subsequent to the deed to the City. The Court said that after a careful consideration it was of the opinion that the better view is that prescription does not run against a municipal corporation in regard to land held by it for the benefit of the whole public.

The defendants in their answer refer to the case of *Morrison vs. Cook*, 146 Ga. 570, as announcing a contrary doctrine. In that case there is found an expression in the course of the opinion which might be misleading unless read in the light of the unbroken line of prior decisions of the Court which establish beyond doubt or controversy the relation of the State to the Western & Atlantic Railroad. In the *Morrison* case, the writer of the opinion said: "The State's ownership of the Western & Atlantic Railroad is a business venture, and in no sense an institution for exercise of governmental functions." For this assertion no fact or reason is advanced; nor, with a single exception, is any authority cited, or any reference made to prior decisions of the Court.

What the learned Justice meant was that with respect to the operation of the railroad the State should not be regarded as exercising a governmental function, although this would not be an accurate expression of the law. The very authority cited to sustain the proposition makes clear this meaning, and is itself authority to the proposition that the State owns the Western & Atlantic Railroad in its sovereign or governmental capacity. The learned Justice quotes from the *Carlton* case, (28 Ga. 180), to the effect that "When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character, and is subject to like regulations with persons employed in the same calling." The learned Justice omitted to make reference to the remainder of the opinion in the *Carlton* case, from which it is manifest that the Court in using the language quoted had reference to the *operation* of the road, and not at all to the character of the *ownership* of the property.

The *Carlton* case was for recovery of damages to a shipment of hogs, and was brought against the superintendent of the Western & Atlantic Railroad under the Act of 1851, permitting such suits. The defense in the case was that the State was not a common carrier, subject to the rules of law that apply to common carriers. The Court fully recognized the public character of the ownership of the road by the State, but held that inasmuch as the State had consented to liability for damage and injury arising out of the operation of the road, it voluntarily became subject to the same rules and regulations with respect to such matters as apply to other persons engaged in the same calling. That the aggrieved person would have been without judicial redress but for the concession of the State in consenting to be sued, is made very plain. The Court said that, in the absence of such consent, the citizen who might acquire rights under regulations applicable to common carriers would find difficulty in asserting that right against the sovereign. The Court then declared:

> "In such cases in England, the King is petitioned in his court of chancery, and the chancellor administers right as a matter of grace, not by compulsion. Here the usual course pursued by the citizen has been to petition the Legislature; and that has been the resort when no other remedy has been provided. The Legislature, however, has wisely and justly provided a remedy for persons having claims against the Western & Atlantic Railroad. They may present them for settlement to the superintendent of the Railroad. If a dispute should arise concerning any claim which cannot be amicably settled, a claimant may bring suit against the superintendent of the Railroad. We think, then, that the State, engaging in the carrying business, *assumes* the obligations and liabilities incident to that business when carried on by individuals, and the remedy is by suit against the superintendent of the road, when the claim cannot be adjusted without."

That the learned Justice in the *Morrison* case had in mind the conduct of the business of the road, and not the ownership of the property itself, seems indicated by the language immediately following the quotation from the *Carlton* case. He there says that "relatively to the business" the pecuniary interest of the State arising out of its ownership of the property cannot give public character to the subject of the incorporation of a competing railroad company which might affect the business of the Western & Atlantic Railroad as a common carrier.

It is perfectly plain that the character of the State's *ownership* of the Western & Atlantic Railroad was not at all in issue in the *Morrison* case, and any reference thereto could be nothing more than dictum.

The Western & Atlantic Railroad was at the time being operated by a lessee from the State. The learned Justice could have meant nothing more than to say that the ownership of the property by the State did not give to that operation of the business such public character as to constitute the exercise of a governmental function. Thus understood, the statement may consist with principle and harmonize with authority; otherwise it would ignore the history of the road and run counter to the many legislative declarations and judicial decisions relating to the public ownership of this great property of the State of Georgia.

Decisions of the Tennessee Courts.

We have herein above shown that the Tennessee Acts conferring upon the State of Georgia the right to construct and operate her railroad partly within that State, were intended to apply to the State of Georgia in her public capacity as a sovereign State. We have pointed out that the Legislature of Tennessee in its memorial of November 10, 1851, gave unequivocal expression to this construction of that legislation, in the declaration that the property and rights of the Western & Atlantic Railroad are vested in a sovereignty "and consequently exempt from the liabilities that attach to individuals or companies of incorporation."

It remains to be considered to what extent the decisions of the Tennessee Courts are consistent with these legislative declarations.

There are three cases in the Tennessee Courts which hold that the State of Georgia may be sued in the Courts of that State with respect to matters affecting the Western & Atlantic Railroad, but upon examination it will be seen that such holding in each of these cases is predicated upon the theory that, as to the transactions involved therein, the State had consented to be sued. The cases to which we refer are: *W. & A. R. R. vs. Taylor*, 6 Heisk. 408; *Hutchinson vs. W. & A. R. R.*, 6 Heisk. 634; and *East Tennessee, V. & G Ry. vs. Nashville, C. & St. L. Ry.*, 51 S. W. Rep. 202.

Both the *Taylor* and *Hutchinson* cases were decided at the same term of the Court; and the opinion in each case was written by the same Justice.

In the *Hutchinson* case the facts were that without any authority from the State of Georgia therefor, a line of steamboats on the Tennessee river was being operated in connection with the Western & Atlantic Railroad. As a result of a collision between two of these boats, the plaintiff's husband lost his life. The suit was against the Western & Atlantic Railroad for recovery of damages.

It is erroneously stated in the opinion that the Western & Atlantic Railroad was a corporation operating under a charter, the State of Georgia being the sole stockholder. As to this the Court said:

> "The fact that the defendant is the property of the State of Georgia, *which is the sole stockholder*, makes it none the less a corporation, able to sue and liable to be sued as other corporations. Here the defendant as a *corporation* and *not the State*, is sued."

This is a clear misconception of the character of the Western & Atlantic Railroad, and the relation of the State thereto, as uniformly declared by the Supreme Court of Georgia, and as subsequently recognized by the Supreme Court of Tennessee.

It is further to be observed that the State of Georgia, prior to the filing of this suit, had by statute authorized suits of this character against the Western & Atlantic Railroad. (Acts, 1862-63, page 182.)

The *Taylor* case was of different character and involved the validity of certain change bills issued by the superintendent of the Western & Atlantic Railroad under authority of an Act of the Georgia Legislature passed during the civil war. The question concerned the authority of the superintendent of the Western & Atlantic Railroad. The Court expressed the opinion that the Western & Atlantic Railroad was to all intents and purposes a corporation, saying that the State of Georgia in its Act creating the railroad had brought it under the same obligations, restrictions, and liabilities as other railroads in the State, and that:

> "It has given it capacity to sue and be sued, and thus voluntarily stripped itself (i. e., the State) of its sovereign capacity *so far as respects the transactions* of the road, and waived all privileges *of that character.*"

Evidently the Court had in mind the Acts of 1851-52 and 1862-63, permitting suits against the State in certain classes of cases. Beyond this the State has never given the Western & Atlantic Railroad capacity to sue or be sued, or vested it with any characteristics of a corporation. In stating that the Western & Atlantic Railroad had been made subject to the same obligations, restrictions and liabilities as other railroads in the State, the Court fell into error of fact directly contrary to the decisions of the Supreme Court of Georgia, particularly that in *Walker vs. Spurlock*, 23 Ga. 436, wherein it was in terms held that an Act defining the liabilities of railroad companies within the State was not applicable to the Western & Atlantic Railroad because that railroad was not a corporation, but was a piece of property owned by the State and administered by her agents.

If it be considered that each of these cases concerned transactions arising out of the operation of the Western & Atlantic Railroad, as to which the State had consented to be sued, then they are entirely reconcilable with principle. Otherwise they are in conflict with the Georgia decisions and with later decisions of the Tennessee Supreme Court.

The public character of the Western & Atlantic Railroad was recognized in the case of *Elliott National Bank vs. W. & A. R. R.*, 2 Lea. 576 (1879). The case involved the authority of the superintendent of the Western & Atlantic Railroad to execute a negotiable note in the name of the Railroad. The suit was brought against the Western & Atlantic Railroad. The State of Georgia, as the owner of the property, was permitted to intervene and defend. The Court referred to the Georgia Act of 1836, providing for "a railroad communication as a State work and with the funds of the State," and to the Tennessee Act of 1838 conferring upon the State of Georgia the right to construct and extend her railroad within Hamilton County, Tennessee. It was said that the character of the Western & Atlantic Railroad in Georgia, and the authority of its superintendent to execute negotiable paper must turn upon the construction of the Georgia statute. Concerning this the Court said:

> "It has been held by the Supreme Court of Georgia that the Western & Atlantic Railroad is not a corporation and that the superintendent of the road belongs to the class of public agents, like the Governor of the State."

Therefore it was held that because of this public relation, the authority of the superintendent, being defined and limited by statute, which was notice to all the world, was that of a public agent, and that no pretension of authority or customary action could amplify that authority beyond the statutory limitation.

This case, then, demonstrates the error into which the Court fell in the *Hutchinson* and *Taylor* cases in assuming the Western & Atlantic Railroad to be a corporation under the laws of Georgia.

The case of *Tappan vs. Western & Atlantic R. R. Co.*, 3 Lea, 106 (1879), was in some respects similar to the *Elliott* case. An attachment bill was filed against the Western & Atlantic Railroad, and the Western & Atlantic Railroad Company (the Lessee) to enforce collection of notes which had been given by the superintendent of the Railroad while under State operation. It was alleged that the Western & Atlantic Railroad had been regularly incorporated with power to sue and be sued, although built and owned by the State of Georgia. The State of Georgia intervened in the case, and claimed that the Western & Atlantic Railroad was owned solely and exclusively by the State of Georgia, and that there was no such corporation as the Western & Atlantic Railroad. This contention of the State was sustained. In this case an amended bill was filed seeking to hold the State of Georgia liable as the guarantor on certain railroad bonds, some of which were alleged to have been issued and used to raise money for building the Western & Atlantic Railroad. As to this amendment the Court held that, not being germane to the original bill, the State of Georgia could not be impleaded with respect thereto. The Court, speaking by Mr. Justice Freeman, said:

> "It is hardly necessary to cite authorities in support of the position that a State of this Union is, as to any other State, a foreign and independent gov-

> ernment; whether sovereign in the fullest sense of the word we do not stop to inquire. No State can be sued in its own courts except by its consent, and certainly cannot be impleaded in a foreign State against its consent. These are axiomatic principles of jurisprudence, about which there can be no doubt or debate."

These cases reflect the judicial opinion of the highest Court of Tennessee concerning the public character of the Western & Atlantic Railroad, and the relation of the State thereto.

In the case of *East Tennessee, Virginia & Georgia Railway Company vs. Nashville, Chattanooga & St. Louis Railway, et. al.*, decided by the Court of Chancery Appeals of Tennessee, and reported in 51 S. W. Rep. 202, when read in the light of the facts and issues involved, does not appear to be adverse to our contention. Contracts had been entered into for the building of the Union Passenger Station on the property of the State of Georgia at Chattanooga for the joint use of the Western & Atlantic Railroad and the several railroad companies entering Chattanooga. To the expense of this construction each of the railroad companies contributed in certain proportions. Thereafter valuable improvements and additions were made to this station. Some of the railroad companies using the station having failed or refused to contribute their proportion to the cost of these improvements, the Governor and Attorney General of Georgia, in behalf of the State as the owner of the Western & Atlantic Railroad, brought suit in the Chancery Court of Hamilton County, Tennessee, to enforce such contribution. In this bill the State alleged joint ownership and use of the building, and sought to recover from the defendant railway companies their proportion of the cost of the improvements and extensions made. In the decree, which was dated November 3rd, 1875, it was declared that the several railroad companies were joint owners with the State of Georgia of the building and liable, each in its proportion, for the cost of repairs, improvements and additions thereto, as well as the cost of the maintenance of the station.

A number of years thereafter two of the railroad companies voluntarily withdrew from the use of this station, and brought suit against the Nashville, Chattanooga & St. Louis Railway (which continued to use and occupy the station) and the State of Georgia, claiming ownership in the property and praying that it be sold and the proceeds distributed to the several owners in lieu of partition. The defendants answered the bill and the State of Georgia also filed a demurrer claiming exemption from the suit. The case turned upon the construction of the decree of 1875. It was contended in behalf of the plaintiffs that the State of Georgia in the bill in that case had recognized and alleged a joint ownership in the building under the contracts therein set up; and that the decree rendered in the case so construed these contracts.

The Chancery Court of Appeals construed this decree to have determined the rights of the parties in the subject matter, and to have found that the several railroad companies were joint owners with the State of Georgia of the building for the purpose of the particular use; but that the railroad companies acquired no interest in the land upon which the station stood. As to this the Chancery Court of Appeals said:

> "Although in terms the parties are spoken of as owners of the building, the whole scheme or plan amounted to an agreement for joint use of the property as a common terminal."

Concerning the liability of the State to be sued the Court apparently thought that only the *administration* of the property for the purpose intended, and not its *ownership* by the State of Georgia, was involved. As to this the Court said:

> "This is a suit concerning the administration of property of that State in Tennessee, for the purposes for which the right to enter the State of Tennessee was given."

So in the separate opinion filed by Mr. Justice Caldwell in the case, he declared:

> "The relief allowed as to the State of Georgia *does not touch her sovereignty*, but concerns only her contracts, etc., as to the operation of a railroad depot."

This case is itself authority to the proposition that in so far as concerns the title and ownership of the property the relation of the State to the Western & Atlantic Railroad is public and governmental in its character. There was introduced in evidence in the case a deed from the then Governor of Georgia (Governor Brown) purporting to convey to the Nashville & Chattanooga Railroad Company one-half of the ground upon which the Union Station stood, the purpose being to use certain recitals in that deed by way of estoppel. The Court referring to the validity and effect of this deed, said:

> "As already stated the proof shows that the property known as the Western & Atlantic Railroad (not company) is merely a piece of property or an investment owned by the State of Georgia. The Governor had no authority, under the Georgia law, to sell any land pertaining to that property, except such as was given him by Section 1008 of the Code of that State. . . . . The recitals, then, (of that deed) even though unobjected to, would amount to no more than a private letter from Governor Brown to a third party; that is, not binding upon any party by way of estoppel, but only as testimony."

We here discover an express affirmation of the finding announced in the *Elliott* and *Tappan* cases that the Western & Atlantic Railroad is not a corporation, but only a piece of property owned by the State of Georgia, devoted to the purposes of railway communication; and of the doctrine there stated that such ownership being public the principles of equitable estoppel do not apply to the State.

It is true that in support of its conclusion that the State of Georgia was subject to suit in that case, the Chancery Court of Appeals referred to and quoted from the Tennessee Act of February 3, 1848, conferring upon the State of Georgia such additional rights in relation to the Western & Atlantic Railroad, with the same restrictions, as were given the Nashville & Chattanooga Railroad Company by the Act of its incorporation, which included, among other things, the right to sue and be sued. The Court in its quotation from the Act of 1848 conferring these additional rights and privileges upon the State of Georgia, subject to the same restrictions as applied to the Nashville & Chattanooga Railroad, omitted to include the important qualifying words "so far as they are applicable."

The title of the Act of February 3rd, 1848, referred to in the opinion is: "An Act conferring upon the State of Georgia *additional rights* in relation to the Western & Atlantic Railroad." In the body of the Act it is declared that all the rights, privileges, and immunities, with the same restrictions which were given the Nashville & Chatanooga Railroad by the Act of its incorporation were "*so far as they are applicable* given to and conferred upon the State of Georgia to be enjoyed and exercised by that State in the construction of that part of the Western & Atlantic Railroad lying in Hamilton County, Tennessee, and in the management of its business."

It should not be overlooked that the declared purpose of the Act of 1848 was to confer additional rights upon the State of Georgia, and not to restrict or limit the rights, privileges and immunities that had theretofore been conferred upon the State in the original Act of January 24th, 1838. The Act of 1838 conferred upon the State of Georgia all the privileges, rights and immunities, (except the subscription on the part of Tennessee) subject to the same restrictions, as far as they were applicable, as were prescribed for the benefit, government and direction of the Hiwassee Railroad. The charter of the Hiwassee Railroad permitted that Company to sue and be sued. This provision was not thought to be applicable to the State of Georgia with relation to the Western & Atlantic Railroad, as is evidenced by the construction placed upon that relation by the Legislature of Tennessee in its memorial to the Legislature of Georgia, hereinabove quoted.

The judicial decisions in Tennessee, taken in connection with the legislative declarations on the part of that State, may be fairly construed as recognizing and adopting the following propositions:

1. That the Western & Atlantic Railroad is not a corporation, but is a railroad property belonging solely to the State of Georgia.

2. That in so far as concerns transactions arising out of the operation of the road, the State voluntarily laid aside her sovereignty and consented to become subject to the rules and regulations governing common carriers.

3. That the property is owned by the State in her public capacity, and is not subject to the incidents of private ownership, and hence prescription does not run against nor does estoppel apply to the State with reference to her ownership of this property.

X.

The State of Georgia being the only party in interest is competent to maintain this suit.

The defendants say that the Western & Atlantic Railroad having been leased to a private company for a term not yet expired the State of Georgia cannot maintain this suit for the reason that the fruits of the litigation would inure to the benefit of the lessee under that lease.

We, of course, recognize that a State may not invoke the exercise of the original jurisdiction of this Court in the determination of a controversy for the benefit of others. In other words, the State must be the real party in interest, and is not permitted to become an actor for the benefit and convenience of private persons.

This case measures fully up to the requirements of this rule. Not only is the State of Georgia the real party at interest, but the State is the only party interested in the event of the suit.

The present outstanding lease contract was executed on the 27th day of December, 1890, under authority of an Act of the Georgia Legislature of November 12th, 1889. At that time that portion of the right of way here in question was in the possession and enjoyment of the Cincinnati Southern Railway and its lessee under permission and authority from the State. There was at that time no present intention to revoke this license and withdraw this privilege. The permissive use of the property so long as it rightfully endured was of such character as to exclude all other persons from any beneficial enjoyment thereof.

The description of the Western & Atlantic Railroad, both in the Act of the Legislature and in the contract made pursuant thereto, was general and indefinite. The State did not in that lease, nor does it ever, warrant title or convey anything more than such title, interest and right of possession as the State at the time may have. There is no covenant that after acquired property or subsequent additions shall come within and be included within the terms of the lease contract. (Trans. p. 266).

In this situation the State did not undertake to withdraw the privilege theretofore granted the Trustees of the Cincinnati Southern Railway and deliver to the lessee the possession and use of this strip of land; nor did the lessee understand that it was acquiring such right of possession and use. The lessee took the Western & Atlantic Railroad as it then stood without the right to claim anything that might be thereafter acquired or restored; nor is the State under obligation, legal or moral, express or implied, to give the benefit of recovery in this suit to the lessee.

After the repealing Act of August 21st, 1916, had been passed, counsel for the Western & Atlantic Railroad Commission gave consideration to the right of the lessee under the lease with respect to this portion of the right of way of the Western & Atlantic Railroad, and advised the Commission with respect thereto. In his report to the Commission, which appear at pages 241-2 of the Transcript, counsel advised the Commission that in his opinion the lessee would have no right to claim possession and use of this strip under the contract of lease. He suggested that in order that the understanding of the parties might be made clear it would be desirable for the lessee to unequivocally disclaim any such right in the subject matter.

Counsel for the lessee concurred in the opinion of counsel for the State that no right accrued to the lessee under the contract of lease with respect to this portion of the right of way of the Western & Atlantic Railroad, and further concurred in the propriety of making formal disclaimer thereof. This advice of counsel being approved by the executives of the Nashville, Chattanooga & St. Louis Railway, the lessee, a formal disclaimer and surrender of any such right was executed by the president, and subsequently ratified by the board of directors of the Nashville, Chattanooga & St. Louis Railway. (Trans. p. 244). A copy of this disclaimer and surrender appears in the margin hereof.[1]

Concerning this disclaimer Mr. John Howe Peyton, President of the Nashville, Chattanooga & St. Louis Railway, under cross examination by counsel for the defendants, testified, among other things, as follows:

---

[1] Whereas, the Nashville, Chattanooga & St. Louis Railway as Lessee of the Western & Atlantic Railroad, did, on February 16th, 1917, execute through its President and Secretary the following paper, to-wit:
Know all men by these presents:

The Nashville, Chattanooga & St. Louis Railway, as Lessee of the Western & Atlantic Railroad, from the State of Georgia, pursuant to an Act of the General Assembly of said State, approved November 12th, 1889, hereby disclaims any and all right of the possession, use and occupation or enjoyment of that part of the original right of way of said Western & Atlantic Railroad in Hamilton County, Tennessee, between Boyce Station and Chattanooga, lying westerly of a line running parallel with and nine and one-half (9½) feet from the center of the track of the Western & Atlantic Railroad, which at the time said lease was, and now is, being used and occupied by The Cincinnati, New Orleans & Texas Pacific Railway Company, as Lessee of the

"Q. Now, what understanding did you have, if any, as to what should take place in case the State of Georgia succeeded in recovering from the defendants in this case this piece of right of way, twenty-three and one-half feet wide by four or five miles long?

A. No understanding of any kind.

Q. Was there any undertaking by anybody or any person, in case the State of Georgia succeeded in recovering

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Cincinnati Southern Railway; and in the event the said lease should be construed as vesting in or transferring to the Lessee any right to possession, use, occupation or enjoyment of said parcel of land hereinabove referred to, in presenti or in futuro, The Nashville, Chattanooga & St. Louis Railway, as such Lessee, hereby surrenders and transfers to the State of Georgia absolutely and unconditionally, but without recourse, any and all such right to the possession, use, occupation or enjoyment of said property for any purpose whatever.

In witness whereof, The Nashville, Chattanooga & St. Louis Railway has caused these presents to be executed in its name and behalf by John Howe Peyton, its President, and has caused its corporate seal to be hereunto attached by its Secretary on this 16th day of February, 1917.

(Seal) JNO. HOWE PEYTON,

As President of the Nashville,
Chattanooga & St. Louis Railway.

Attest:

(Seal) T. A. CLARKSON, Secretary.

Now, therefore, be it—

Resolved by the Board of Directors that the execution of said paper is hereby approved, ratified and confirmed in every respect as of the date of its execution.

this property, that this property should pass under this lease that expires December 27th, 1919?

A. No such suggestion was ever made to me.

Q. Was it your understanding, then, that you were giving up this 23½ foot right of way permanently to the State of Georgia?

A. It was my understanding that we had no right to it, —no title to it." (Trans. pp. 102-103.)

There is nothing in the case of *Southern Railway Co. vs. State of Georgia*, 116 Ga., 276, that militates against the right of the State to maintain this suit. That case was in the nature of a possessory action, and prayed not only for possession, but for an accounting of the mesne profits. While it was asked that title to the property be decreed to be in the State, there was no allegation of any injury to the freehold, nor was any equitable relief prayed for. The Court held that under the allegations of the petition the State not being entitled to possession could not maintain a suit therefor; that a merely declaratory action praying no equitable relief is not maintainable in the State of Georgia, and that a demurrer to such petition should be sustained. In this connection the Court said:

> "The object of an action is to redress or prevent a wrong, and it is essential that the plaintiff should seek something more than a mere declaration of his rights. In a suit respecting titles to land, the court does not pass upon all questions suggested, but decides only such questions as are necessary to determine the right of the plaintiff to the relief prayed against the defendant. Where no relief is prayed, the Court cannot undertake to decide such legal questions, however im-

> portant or interesting, as may be suggested by a plaintiff who is in doubt as to his rights."

The fundamental difference between this case and that is obvious. Here purely equitable relief is sought in protection of the State's right to the free and unrestricted use and enjoyment of its own property. The defendants do not set up an adverse claim of right or title under color of any assurance of title for this authority other than from the State itself; in other words, the claim is made under the title of the State and not in hostility thereto. The State asserts that only a provisional use of the property having been granted, and this privilege having been withdrawn, the defendants are merely trespassers upon the property of the State; and hence seeks equitable relief by injunction against a continuing trespass and a constantly recurring grievance. For such injury there is no pecuniary estimation of damage and no other adequate remedy.

XI.

Equities of the Parties.

It is elementary that a license, although executed, may be revoked as to any subsequent act or privilege thereunder, notwithstanding that the licensee may have incurred expense on the faith of the license. In so far as the license has been executed it cannot be revoked so as to render the licensee a wrongdoer with respect to what he has done under the license.

When, however, valuable improvements have been made by the licensee on the land of the licensor, equity sometimes permits the removal of such improvements to the extent that this can be done without injury to the freehold. In such cases where the licensee expends money in adapting the land to the particular use, the license may not be capriciously and arbitrarily revoked without affording the licensee reasonable opportunity of receiving the benefit of his expenditures.

These principles spring out of the doctrine of equitable estoppel which forbids one person to mislead another to his injury. This does not mean, however, that expenditures made in improving the property for the use of the licensee can convert a precarious privilege into a permanent right.

Pretermitting the question whether such principle of estoppel would apply to the State, the complainant in this case seeking equity offers to do equity. The State of Georgia in asserting her own rights has no disposition to cause any unnecessary loss or inconvenience to the defendants.

Looking to the facts of the case we find that the defendants own an ample right of way immediately adjoining that in question upon which they can shift their tracks and superstructures without in the least interfering with their ability to serve the public and perform all of their essential corporate attributes. The State is entirely willing that these tracks may be so removed, and that the defendants may be allowed a reasonable time within which to effect such removal. That the defendants will be put to some expense in thus shifting and rearranging their tracks is beside the mark, nor does it matter that the defendants might be required to incur additional expenditures in obtaining sufficient clearance under the several bridges and viaducts. The privilege granted, being temporary and provisional, it must have been contemplated that such expenditures would arise upon the termination of the right to use the property; and hence whatever these expenditures may be no hardship is worked or injustice done to the defendants. If it were otherwise, the defendants, could by their voluntary act, amplify a mere privilege into a permanent right, and thus deprive the State of its property without its consent. The State of Georgia has been generous and forbearing with these defendants in affording them abundant opportunity to enjoy in the value of this long use reasonable compensation for their expenditures on this property.

If it were considered material to this argument we think we could show from the evidence that there already exists under these bridges and viaducts clearances, both horizontal and vertical, such as would admit of the laying of such additional tracks as may be required by the defendants, who already have under each of these bridges several of their own tracks. This we think appears from the cross examination of defendants' Chief Engineer, Mr. Daugherty, shown at pages 199 to 202 of the Transcript.

WILLIAM A. WIMBISH,
Solicitor and Counsel
for the State of Georgia.

525 Grant Building, Atlanta, Ga.
August 31, 1918.

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No. 21 ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1918

THE STATE OF GEORGIA,
Complainant,
vs.
THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY, AND THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Defendants.

REPLY BRIEF IN BEHALF OF COMPLAINANT, THE STATE OF GEORGIA.

We shall not undertake an extended reply to the brief of counsel for the defendants since the argument they present was largely anticipated in our original brief, and we desire to avoid repetition.

The learned counsel argue that the use was intended to be permanent, and not being specifically limited in point of time will be impliedly given a like duration with that of the Cincinnati Southern Railway or the Western & Atlantic Railroad. They further contend that such grant was supported by a legal consideration and was within the power of the Georgia Legislature to make; although they say that the State of Georgia is now estopped from questioning either the fact or the adequacy of the consideration, or the constitutional power of her Legislature to make a grant of the perpetual use of the property.

To the reasoning submitted in support of these contentions we desire to make brief reply.

Duration of the use.

The learned counsel argue that the use was granted and employed for the purpose of extending the main line of the Cincinnati Southern Railway from Boyce into Chattanooga, and is therefore to be construed as the grant of a use commensurate in duration with that Railway.

This argument is predicated upon the theory that the use of said property was in some way essential to the exercise of the general powers and duties of the Cincinnati Southern Railway; and that the State in granting this use intended that it should endure so long as the Cincinnati Southern Railway continued in the discharge of its corporate attributes.

This, we think, is a fundamental error. No public franchise or use could be granted the Cincinnati Southern Railway by the State of Georgia, nor were any of its rights or privileges to be exercised, or its duties to be performed, within the jurisdiction of that State, or in the service of the public of Georgia.

This case therefore does not fall within the authority of the *Detroit Street R. R. Co.* case, 184 U. S. 395; the *Boise Water Company* case, 230 U. S. 84, and others of the series of like cases cited by counsel in their brief. All of these cases will be found to relate to the duration of franchises, or to rights and powers having a necessary relation to or an essential connection with the power of the corporation to discharge its corporate attributes within the jurisdiction of the granting power.

The English cases cited and discussed at page 20 to 25 of the defendants' brief both relate to contracts concerning running powers given interchangeably between railway companies for their mutual benefit and advantage. In each of these cases the contract was mutual in its obligations, was supported by valuable consideration, and was intended to be permanent. Nothing in the contract nor in the relation of the parties suggested that either would have the right to terminate the contract against the will of the other.

So in the cases of *Franklin Telegraph Co. vs. Harrison*, 145 U. S. 459, *Western Union Telegraph Co. vs. Penna.*, 129 Fed. 849; *United States vs. Baltimore & Ohio R. R. Co.*, 1 Hughes, 138, and other cases cited to the same effect, the right claimed was found to have been intended to be permanent, and therefore not determinable at will.

The initial inquiry remains the dominant one; and that is whether the legislative intent was to grant a provisional use or a permanent right, and this cannot be made to rest upon implication.

Counsel recognize that they must first find evidences of an intention to make a permanent grant before they can invoke the implication of perpetual duration.

Counsel have been diligent in their minute search for indicia of permanent intent. Those they present as manifesting such intent are the following:

(a) That the title of the Act refers to the grant as being that of a right of way. They say that a right of way is intended to be permanently used, and the granting of a right of way to a railroad company conveys a perpetual easement in the property.

The unqualified grant of a right of way offered and accepted as an inducement for the building of a railroad ordinarily may create a permanent easement. A railroad, however, may use a right of way without acquiring a permanent right to such use. Whether the right be permanent or be determinable it is nonetheless a right of way. It is to be further observed that the title is not a part of the Act, and is employed only to indicate the subject of the legislation. Whether the right of way, the use of which may be granted in the Act, was intended to be temporary or permanent is not indicated by a title such as that in this case.

(b) That the recital in the preamble of the Act that the City of Cincinnati had nearly completed the Cincinnati Southern Railway suggests that the State of Georgia intended to furnish a permanent right of way for its full completion.

Under the facts of this case no such implication arises. The Cincinnati Southern owned an ample right of way, and there was no reason why it should not build its railway from Boyce into Chattanooga over the route it had located, other than considerations of convenience and economy. As we have pointed out, there was no reciprocal obligation whatever as between the State of Georgia and the Cincinnati Southern Railway, and no reason can be imagined why the State of Georgia should furnish a permanent right of way for the completion of that Railway.

(c) That the recital in the preamble that the routes of the two railroads run parallel to and adjoining each other conveys to the mind the idea of something permanent.

This idea is almost too shadowy and attenuated to grasp. Undoubtedly the route of the Western & Atlantic Railroad was intended to be for the permanent use of that road, and similarly the route located for the Cincinnati Southern Railway was intended for the permanent use of that Railway; but the fact that each road had located permanent routes hardly carries with it even a faint suggestion that the permission given one road to use a part of the route of the other implies a permanent right. It is further to be remembered that the route of the Cincinnati Southern Railway has not been abandoned or given up, but is still available for its use.

(d) That the declaration that the location of the tracks and works close together would be of mutual advantage in maintaining and operating the railroad implies a permanent unity of tracks and works, else, how, counsel ask could both railroads enjoy the advantage of a stronger and firmer roadbed if the tracks of the Cincinnati Southern Railway were not to be there permanently.

The obvious reply to this is that if the joint use and operation was of advantage to each of these roads it would be enjoyed so long as the use continued, whether for a longer or shorter time. Had the grant of the use been for a definite term, say ten years, the supposed mutual advantage would have accrued and continued during that period.

Provision of equality in grade not evidence of permanent grant.

The most ingenuous deduction of permanent intent made and emphasized by the learned counsel is founded upon the requirement of the proviso of the Act that the grade to be adopted by the Cincinnati Southern Railway over and along this right of way "shall *always* be the same as that of the Western & Atlantic Railroad."

At page 17 of their brief the learned counsel say:

> "And in providing that the grade to be built on that right of way, 'shall *always* be the same as that of the Western and Atlantic Railroad', we have evidence as convincing (as proof of holy writ) that this grant was to be of like duration with the Western & Atlantic Railroad. For how could the Cincinnati Southern Railway *always* maintain a grade of equal height with the Western and Atlantic Railroad unless it *always* had a title that would enable it to do so?"

And again on page 87:

> "Now, *'always'* does not mean for a little time, nor for a short time, it just means *always*. This is conclusive evidence that the Legislature of Georgia did not have in mind any kind of abbreviated grant."

This manifests a curious misconception of the meaning of the word "always" in the connection in which it is here used. The context makes it perfectly plain that the word is not employed to express *duration of time* but *constancy of maintenance.* The word as used in this sense is defined by the Century dictionary as meaning, among other things: "at all times; continually; uninterruptedly"; and by the Standard dictionary as "at all times; invariably". That the word "always" as used in the statute is not the equivalent of "forever", see *Gygers' Estate,* 65 Penna. State, 311, *Werdenbaugh vs. Reid,* 20 W. Va. 588.

It is quite clear that the language means that at all times during the continuance of the use this equality in grade shall be constantly maintained.

It is interesting to note that the learned counsel failed to observe the use of the word "always" in the proviso immediately preceding that to which they refer. It is there declared:

> "Provided *always,* that this grant is subject to the consent and approval of the lessees of the Western & Atlantic Railroad as to the term of their lease."

If the word as used in this Act has reference to time, the consent and approval of each successive lessee of the Western & Atlantic Railroad is essential to the continued existence of the right. Should the definition "at all times" be applied, it would likewise follow that such successive consents must be had.

Duration of use limited to term of outstanding lease.

At the time of the adoption of the Act the Western & Atlantic Railroad was under lease to an operating company for an unexpired term of some eleven years. Under this contract of lease the lessee was required to maintain the roadbed and property of the Western & Atlantic Railroad in first class condition, so that the obligation to repair any damage or injury occurring from flood or otherwise would fall upon the lessee and not upon the State. Similarly, any benefit that might result from economy in the operation of the road would inure solely to the benefit of the lessee. Whatever protection to the property or economy in its operation that might have been expected to attend the contemplated use by the Cincinnati Southern Railway were matters which immediately and directly concerned the lessee.

The State was willing to grant the Trustees of the Cincinnati Southern Railway the provisional use of this right of way, subject to recall by the State. This privilege could not be conferred by the State without the consent of the lessee. It was therefore provided in the Act that the grant of the use should be subject to the consent and approval of the lessees of the Western & Atlantic Railroad *as to the term of their lease.* A fair and reasonable construction of this language, in view of the facts and of the obligations of the parties, is that while the privilege granted was subject to recall, this right would not be exercised by the State during the term of the then existing lease. If the arrangement proved advantageous the lessees would receive the full benefit thereof during the term of their lease in compensation for a surrender of the use of that portion of the right of way. The Trustees of the Cincinnati Southern Railway would be allowed at least eleven years within which to make such improvements and adjustments as would enable them to conveniently use their own right of way from Boyce into Chattanooga, and to receive in the value of the use reasonable compensation for the expenditures made in their own interest.

This construction of the Act protects the rights and interests of all parties. It explains why the State would permit the use of so large a part of her property without any valuable consideration or compensating advantage to the State itself. It reconciles with business prudence the expenditures by the Trustees of the sums necessary to adapt the roadway to the use of their railway. It justifies the willingness of the Lessees of the Western & Atlantic Railroad to give their consent, since there would probably be no need for the use of this strip during the remainder of the term of their lease; and any traffic or other advantage that might accrue to the Western & Atlantic Railroad would inure to their benefit.

If the grant of the use be treated as a running power, it was operative as between the Cincinnati Southern Railway and the then Lessees of the Western & Atlantic Railroad. The Lessees having given their consent could not withdraw it during the term of that lease; and the State may be considered to have impliedly agreed that she would not exercise her right of recall during that time. Thus a common duration would be given to the lease of the property and to the right of the use thereof granted by the State.

After the expiration of the then outstanding lease (December 27th, 1890) the legal status of the Cincinnati Southern Railway was that of a tenant at will. That Railway and its Lessee lawfully continued the use of the property, subject always to the right of the State to recall the privilege whenever it saw proper to do so. The subsequent use and possession of the property by the Cincinnati Southern Railway and its Lessee was therefore not adverse to, but with the consent of the State, until the privilege was withdrawn by the Act of August 21st, 1916.

Power of the Georgia Legislature to make a perpetual grant.

There is no force in the argument of opposing counsel (p. 83 of brief) that after all these years the State of Georgia should be now estopped from asserting the invalidity of an Act of the Legislature as being in excess of the constitutional limitation upon its power. Not only is this argument unsound, but it avoids the point of our contention.

The argument we present is that the Georgia Legislature was forbidden by the State Constitution to make a grant of the State's property, unless upon a valuable consideration of the character indicated; that the grant of a perpetual, exclusive use is in effect a grant of the property, within the meaning of that Constitution; and hence that the Act is not to be construed as manifesting an intent to make such perpetual grant.

The principle is that the Act is to be so construed as to reconcile it with constitutional authority, rather than to give it that construction which would condemn it. The presumption that the Legislature intended to observe the constitutional limitation upon its power, will be indulged and if possible allowed to prevail. *United States vs. Del. & Hud. Co.*, 213 U. S. 366, 407-8.

The lack of constitutional power to make a grant of the property is cogent evidence of the absence of legislative intent to make such a grant. The very fact, adverted to by counsel in their brief, that the Legislature of Georgia was composed of intelligent men, familiar with the constitution and laws of their State, lends added force to the argument we submit.

If, as we contend, the grant was without valuable consideration, it was a nude pact and as such devoid of legal obligation. In this aspect of the case the constitutional question would become academic, *excepting as illustrating and reflecting the legislative intent to keep within the constitutional limitation.*

If the Act is to be construed as making a perpetual grant of the State's interest in and dominion over the property, it is invalid because in excess of the power of the Legislature to make. If the Legislature observed the limitation upon its power, as it is to be presumed to have done, the use granted could be nothing more than a right or privilege subject to recall.

The consideration.

It cannot be doubted that if the grant is anything more than a determinable privilege it must be supported by a valuable consideration. Not only does the absence of such consideration indicate the legislative intent, but it also goes to the question of the validity of the grant of the property, or a perpetual interest therein.

To make valid a contract with the State the same necessity for a consideration exists as if the contract was between private parties. A contract without such consideration is a nude pact or gratuity which may be kept, changed or recalled at the pleasure of the State, even though money may have been expended on the faith of it. *Grand Lodge vs. New Orleans*, 166 U. S. 143, *West Wisconsin R. Co. vs. Trempeleau*, 93 U. S. 559. *Turner vs. Ferguson*, 22 Wall, 527. *Christ Church vs. Philadelphia County*, 24 Howard 300.

As pointed out in our original brief in cases of the grant of a franchise, or of rights, privileges and immunities essential to its exercise, or necessarily related thereto, a legal consideration arises from the implied obligation imposed upon the grantee to employ the franchise, right or privilege in the service of the public from whom the grant has been received. In such cases the right or privilege remains within the control of the granting power, and may be revoked if the grantee fails in the discharge of its public duty, or otherwise fails to rightfully employ the privilege granted. *Chicago Life Ins. Co. vs. Needles*, 113 U. S. 574; *Given vs. Wright*, 117 U. S. 648; *Farmers L. & T. Co. vs. La.*, 185 U. S. 236; *Columbus vs. Mercantile Trust & Deposit Co.*, 218 U. S. 645; *New York Electric Lines vs. Empire City Subway*, 235 U. S. 179, 195.

The learned counsel in their brief (pages 56-7) assume the position that the recital in the Act that the location of the tracks and works close together would be of advantage to both roads as conducing to economy in maintenance and operation and as affording protection against overflow in the Tennessee river, conclusively imports a valuable consideration which the State is estopped from denying or inquiring into. They say that it is quite immaterial whether in fact any advantage may have accrued or any protection have been afforded to the Western & Atlantic Railroad; and they complainingly say that evidence of the facts was admitted over their objection.

The contention that the mere declaration in the Act that the arrangement would prove advantageous to the Western & Atlantic Railroad conclusively imports a valuable consideration which cannot be contradicted, would seem to call for no reply. Whatever may have been the rule at common law concerning instruments under seal, such doctrine does not now obtain with respect to contracts, the consideration of which is always open to inquiry. The mere recital of a consideration does not foreclose judicial inquiry into the fact and character of the consideration.

This attitude assumed by counsel in their brief is inconsistent with the answer wherein the defendants pleaded that the construction of the Cincinnati Southern Railway on the right of way in question was in fact of great advantage to the State, and that "the benefits ensuing therefrom to the State of Georgia were of the utmost value, and the construction of the roadbed protecting the right of way of the Western & Atlantic Railroad has been through all these years and still is a valuable consideration for said grant." (Trans. p. 25-6.)

Counsel cannot now escape the issue they themselves tendered because the facts developed in the evidence may not be to their liking.

That the consideration must in fact have been valuable seems to be recognized by counsel at page 83 of their brief. They there say that the consideration consisted in the construction and maintenance of a specified work for "the improvement, betterment and protection of the State's property" by "devoting a part of the right of way to the protection of the remainder", there being "imposed on part of the Western & Atlantic right of way a kindred servitude in favor of the Cincinnati Southern Railway, and in return for value rendered by the latter."

The issue then is whether the Act recites a valuable consideration, and if so, whether in fact it has proven to be such.

The Act expresses no valuable consideration.

No expression of any consideration is to be found in the Act unless it be in the recitals of the preamble. If this preamble is to be discarded as no part of the Act, then clearly there is no consideration named. If we are permitted to look to the preamble at all then all of its recitals must be regarded and given pertinency of meaning.

Looking to the preamble we find two outstanding declarations: first, that the Cincinnati Southern Railway would form an important feeder and practically an extension of the Western & Atlantic Railroad, and second, that the location of the tracks and works close together would be of mutual advantage in the maintenance and operation of the road, and in affording protection against overflow from floods in the Tennessee river.

Counsel would ignore the first and more important of these declarations, and rely upon the second as expressing a valuable consideration. These declarations or representations, or whatever they may be, were both intended to express a consideration, or neither was. They must stand or fall together; they cannot be separated and efficacy attributed to one and denied to the other. Obviously the inducement held out that the Cincinnati Southern Railway would form an important feeder and practically an extension of the State's railroad was intended to and probably did influence the Legislature in granting the use of the State's property to a greater extent than the recital that the location of the works close together would be of mutual advantage to these roads. Indeed counsel in their brief at page 79 say that if such a project was ever entertained the abandonment of Boyce as a point of interchange for traffic and the substitution of Chattanooga therefor "evidently in large measure led to the enactment of this grant in 1879."

But for the representation of the traffic advantage that would flow to the State's railroad no one can say that the Legislature would have granted any use of the State's property.

The learned counsel (at page 40 of their brief) ask upon whose representations the State of Georgia built this "colossal expectation". They say it is not averred that the Trustees of the Cincinnati Southern made these representations, or that they were not made in perfect good faith. The brief continues:

> "What benefit would accrue to the Western & Atlantic Railroad by completion of the Cincinnati Southern Railway, and how far it would be a feeder to that line, and how far the State of Georgia at large would derive benefits from that source, were subjects open to all, and on which every person had the right to bestow the energy of his imagination * * * * * * * *. Disappointment resulting from immoderate expectation should be borne in silence."

It appears from the testimony of Major McCollum that Major McGuffy at the time acted as the representative and attorney of the Trustees of the Cincinnati Southern Railway before the Legislature of Georgia for the purpose of obtaining the use of the right of way from Boyce into Chattanooga. (Trans. p. 108.) Under all the facts and circumstances it is not unreasonable to assume that the Trustees of the Cincinnati Southern, or their representative in their behalf, made or adopted the representations contained in the preamble to this Act. That, however, is not very material. The recitals were in the Act, and if they express either inducement or consideration they must be so regarded, by whomsoever made and whether or not in good faith. The Trustees of the Cincinnati Southern Railway in accepting the privilege of this use did so with knowledge that these recitals were contained in the Act; and if these implied an obligation or consideration they must be observed, or the benefit received under the Act must be surrendered. It was not a subject upon which "every person had the right to bestow the energy of his imagination". On the contrary, it was a declaration or promise that could have been kept in good faith by the Trustees of the Cincinnati Southern, and was not. The complete failure and refusal of these Trustees and their lessee to observe the expectation thus held out, when it was in their power to do so, while a disappointment, is not one resulting from "immoderate expectation".

The recital of mutual advantage that would result from the proposed use of the right of way by the Cincinnati Southern Railway was merely prospective of an incidental benefit of no substantial value to the State. The obligation to protect and maintain this roadway rested upon the Lessee of the Western & Atlantic Railroad.

We have argued in our original brief that the improvement of property for the exclusive use and benefit of a grantee does not afford a valuable consideration for a grant of the perpetual use of the property, even though some incidental benefit to the grantor may result therefrom.

It must be plain that the Legislature did not regard the representation of an incidental benefit that would accrue to the Lessee in the maintenance and operation of the Western & Atlantic Railroad as a valuable consideration for a grant of the perpetual use of the property.

No present consideration moved between these Trustees and the State at the time of the adoption of the Act or of the appropriation of the use. No legal obligation was cast upon either party to do or refrain from doing anything; certainly there was no obligation upon the Trustees which could be either enforced or violated. The work was not required to be done or maintained in any specific way, the single requirement being that so long as the property was used by the Cincinnati Southern Railway its grade should be made to conform to that of the Western & Atlantic Railroad. If the Act was in any sense a contract it was without binding force since it was lacking in consideration, was devoid of mutuality, and could be abandoned by the Cincinnati Southern Railway whenever it might choose to discontinue the use.

There was no consideration in fact.

Upon the issue that the construction of the Cincinnati Southern Railway afforded valuable protection to the roadbed of the Western & Atlantic Railroad the defendants have distinctly failed to make good their plea.

The evidence is quite clear that the old and well seasoned roadbed of the Western & Atlantic Railroad had become impervious to the action of the back flow from the river, and hence neither required nor received any protection against such flow.

On the rare occasions when the river reached a flood stage of 50 feet or more the damage was confined to the surface of the roadbed at the one point where the current crossed over.

The construction of the Cincinnati Southern Railway afforded absolutely no protection against damage in such times of flood.

The effect, in so far as damage from high water and flood is concerned, would have been precisely the same had the Cincinnati Southern Railway been constructed on its own adjacent right of way.

Such protection, if any, as may have resulted from the joint construction accrued solely and exclusively to the Cincinnati Southern Railway in affording protection to its embankments while new and green, and therefore then susceptible to disintegration from the back flow of water.

The evidence further establishes that no advantage whatever accrued to the Western & Atlantic Railroad in maintaining the roadbed and facilitating railroad operation.

Mr. Hunter McDonald, Chief Engineer of the Nashville, Chattanooga & St. Louis Railway, who for a number of years was engineer in charge of maintenance of the Western & Atlantic Railroad, testified that the construction of the Cincinnati Southern Railway on the right of way of the Western & Atlantic Railroad was a very great disadvantage from an operating standpoint. These disadvantages consist in confining the operation of maintenance to practically one side of the track, thereby rendering it more expensive and inconvenient; the exposure of workmen to danger from passing trains on the Cincinnati Southern tracks; and the necessity of drainage of the track entirely to one side, thereby retarding the speedy drying out of the roadbed. To the question, "What benefit or value, if any, has accrued to the Western & Atlantic Railroad by reason of the construction of the Cincinnati Southern Railway on the right of way in question?" Mr. McDonald replied "None". (Trans. pp. 61, 62.)

Mr. Curtis Daugherty, Chief Engineer of the Cincinnati, New Orleans & Texas Pacific Railway Company, testified that he did not regard the disadvantages mentioned by Mr. McDonald as being at all material, practically. He recognized that there was some difficulty in disposing of the water falling on the roadbed because of the existence of additional tracks, but thought it a small item. He further recognized that there was some danger to trackmen working on the Western & Atlantic tracks because of passing trains on the Cincinnati Southern tracks. Mr. Daugherty pointed out no compensating advantage in the railroad operation from this joint roadbed, but was of the opinion that the embankment improved the support of the Western & Atlantic track on its sub-grades, particularly on the embankment where the expense of maintenance of track depended to some extent on the stability of the embankment, and a wide embankment is more stable than a narrow one; and further that the Western & Atlantic Railroad was relieved of the maintenance of one side of the embankment. (Trans. 183, 184.)

From the testimony of these engineers for the respective parties it is apparent that the joint construction is of no substantial advantage, even if it be not a positive disadvantage, to the maintenance and operation of the Western & Atlantic Railroad.

Effect of discontinuance of use.

Counsel argue that the Cincinnati Southern Railway having adjusted its yards to meet the conditions, and several viaducts having been constructed which interfered with any track rearrangements "the Cincinnati Southern Railway is at this time *absolutely dependent* upon, and does *absolutely require the use of this right of way;* and it would not only be a great injustice, but would wreck the Cincinnati Southern Railway to require it to discontinue this roadbed". (Defendants' brief, page 53. Italics in the brief.)

This is strong language, the indulgence in which should find justification in convincing evidence. We find nothing in this record that we think warrants the statement that the Cincinnati Southern Railway "is absolutely dependent" upon the permanent use of this right of way, or that a discontinuance of the use would "wreck" that Railway.

Certainly the evidence of Mr. Daugherty referred to by counsel (page 188-9 of the transcript) does not sustain such sweeping and unequivocal statements. Turning to this testimony we find that Mr. Daugherty when asked what effect the discontinuance of the use of the Western & Atlantic right of way would have upon the yard tracks of the Cincinnati Southern Railway and its Lessee, replied that it would present an awkward situation at this time.

Mr. Daugherty under examination of his counsel further testified as follows:

"Q. Well, in what respect would it be awkward?

A. The yard tracks have been designed to occupy the entire available property west of the two main tracks, which are now located on the property granted to the Trustees and in the couse of time several reinforced concrete viaducts have been built and the spans of those viaducts have been located with reference to the tracks as they now exist and as they are now operated.

Q. State whether or not there would be room on the right of way owned by the Cincinnati Southern Railway outside of the Western and Atlantic right of way, considering that right of way to be 66 feet wide, for an adequate readjustment of these yards, in case this Georgia grant was annulled?

A. In so far as the capacity of the yards is concerned it would, of course, be less than it has now, and it is not enough now, and so far as the actual readjustment of the tracks is concerned, as I stated, it would be *very awkward* because of the construction of expensive viaducts which would be difficult to change and revise the location of streets to suit the revised system of tracks entirely outside of the 66 foot strip of the Western and Atlantic."

Mr. Daugherty's reference is to a rearrangement of yards and yard tracks wholly on the right of way of the Cincinnati Southern and its Lessee. He does not say that there is not room enough under these viaducts to accommodate at least two main line tracks of the Cincinnati Southern on its own right of way.

Mr. Hunter McDonald testified at page 63 of the transcript that the only change in any of these overhead structures necessary to allow two tracks to pass under on the Cincinnati Southern right of way would be in the plate girder Southern Railway crossing. The testimony of Mr. Daugherty on cross examination appearing at pages 199 to 203 of the transcript is not in contradiction but tends to support this testimony of Mr. McDonald.

What Mr. Daugherty says is that the rearrangement of yard tracks consequent upon the shifting of the main line tracks on to the Cincinnati Southern right of way would be very awkward because there would not be room enough under these viaducts to conveniently accommodate all of the desired yard tracks.

The production of an awkward situation such as that described is far removed from such a disaster as would wreck the Cincinnati Southern Railway.

Respectfully submitted,

WILLIAM A. WIMBISH,
Counsel for Complainant.

October 10, 1918.

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No. 21 ORIGINAL.

In the Supreme Court of the United States

OCTOBER TERM, 1918

THE STATE OF GEORGIA,
Complainant,

vs.

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY, and THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Defendants.

ADDENDUM TO REPLY BRIEF FOR COMPLAINANT.

Counsel for the defendants offer an addendum to their brief wherein they set out two sections of the Georgia Code of 1882 concerning the relation of the State to the Western & Atlantic Railroad, and also refer to the case of *Scofield Rolling Mill Company vs. The State of Georgia*, 54 Ga. 635, as bearing upon the same subject.

Section 964 of the Code of 1882 quoted by the counsel is carried in the Georgia Code of 1910 as Section No. 1288. While this section is not a codification of any Act of the

Legislature it is an expression of the law made under authority of the State, and is to be accepted as such.

The declaration is that the relation of the State to her railroad is the same as that which governs any incorporated company to its railroad with respect to obligations due to and from the public, with the important qualification *"so far as is consistent with the sovereign attributes of this State,"* and the conduct of the Western & Atlantic Railroad. There is thus expressly preserved the immunity of the State from any interference with her ownership and control of the property, whether by direct judicial action or by application of such doctrines as those of prescription and equitable estoppel. In other words, the State consented to assume liability for transactions arising out of the use of the property in the operation of the railroad, but none other. To extend the concession further would be to trespass upon the sovereign attributes of the State and overleap the laws in force for the conduct of the railroad.

The laws in force for the conduct of the Western & Atlantic Railroad in so far as concerns its public obligations are found in the Act of January 15th, 1862, (Georgia Acts 1851-2, p. 111), and in the Act of April 18th, 1863 (Acts of 1882-3, p. 182), both of which were referred to in the stipulation between the parties to this cause, and discussed in our original brief.

At the time of the passage of these Acts the Western & Atlantic Railroad was being operated by the State of Georgia under a superintendent. The Section quoted by counsel as 974 of the Code of 1882 is a codification of the Act of 1852, and related merely to the venue of suits of the kind that had been authorized to be brought against the superintendent of the Western & Atlantic Railroad.

The Act of 1863 appears in the Code of 1910 as Section 1290, and is as follows:

> "*Laws applicable to Western and Atlantic Railroad.* All laws of force regulating the liability of railroad companies in this State, for damages done by the running of locomotives, cars, and other machinery, are hereby declared to apply equally to the Western and Atlantic Railroad; and in the bringing of all suits against the Western and Atlantic Railroad, the same shall be regulated by the laws in existence on that subject at the time of the adoption of this Code."

There are no provisions to be found in the laws of Georgia which may be construed as in derogation of the State's sovereign attributes with respect to the Western & Atlantic Railroad other than those above quoted and referred to, which relate wholly to transactions arising out of the operation of the road.

The case of *Scofield vs. The State of Georgia* was peculiar in its facts. At the time of the transaction concerned the State Government was under carpet bag control, and great liberties were being taken in the administration of State affairs. In that case the agent of the Milling Company colluded with the treasurer of the Western & Atlantic Railroad in defrauding the State by means of a fictitious sale of iron rail, the proceeds of which seem to have been divided between them. The Court held that the State could not recover from the Milling Company the money that had been fraudulently taken from the treasury of the Western & Atlantic Railroad, the Company being itself innocent of offense and receiving no benefit therefrom. In its opinion the Court used the language quoted by the learned counsel, which, however, was immediately followed by the words "But to bind her, her agents must be acting within the scope and on the line of their duties."

The idea seems to have been that inasmuch as the money fraudulently taken did not inure to the benefit of the Milling Company, that Company was not answerable for the fraud of its agent colluding with the general agent of the State. In the conclusion of the opinion the Court indicated its idea of substantial justice in the following language:

> "The State is too great and too noble to have her agents act otherwise (than honestly) toward the humblest of her people."

It is further to be noted that the transaction involved in this case in no way affected the ownership of the Western & Atlantic Railroad by the State, but concerned a business transaction within the general scope of the authority of the treasurer of the Railroad.

Respectfully submitted,

WILLIAM A. WIMBISH,
Counsel for the State of Georgia.

November 2nd, 1918.

[illegible]

upreme Court of the [illegible]

October [illegible]

THE STATE OF GEORGIA,

[illegible]

vs.

TRUSTEES OF THE CINCINNATI [illegible]
WAY and THE CINCINNATI [illegible]
PACIFIC RAILWAY COMPANY

[illegible]

Brief [illegible]

FREQUENCY OF FLOODS IN TENNESSEE RIVER REACHING W. & A. EMBANKMENT.

(Rec. 170 et seq.)

April	1874	29 feet
February	1875	54 "
2nd flood	1875	28 "
April	1877	29 "
March	1880	38 "
January	1882	40 "
March	1884	43 "
April	1886	52 "
March	1890	42½ "
March	1891	39 "
	1892	37 "
	1896	40 "
	1897	38 "
	1899	37½ "
2nd flood	1899	40 "
	1900	24 "
	1901	33 "
	1902	40 "
	1903	31 "
	1906	33 "
	1911	29 "
	1912	31 "
	1913	32½ "
	1914	33 "
	1915	34.4 "
	1916	32.9 "
	1917	47.7 "
	1918	42½ "

STAGES THAT REACH EMBANKMENT.

16 ft. reaches embankment for length of 700 feet.

28 ft. reaches embankment for length of 1350 feet, height on embankment 15 feet on big fill.

38 ft. reaches embankment for length of 7370 feet for height of 22 feet.

43 ft. reaches top of ties for one mile.

52 ft. reaches 9 feet over track from point 17 ft. of Boyce to Chattanooga.

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Supreme Court of the United States

OCTOBER TERM, 1918.

THE STATE OF GEORGIA,
Complainant,

No. 21 Original. *vs.*

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,
Defendants.

Brief for Defendants.

STATEMENT OF CASE.

Shortly after the close of the Civil War, the State of Ohio authorized the City of Cincinnati to provide a line of railway from that city to such other terminus as the city might select. The legislation conferring the authority was general in character. Advantage was taken of it by Cincinnati which built the trunk line known as the Cincinnati Southern Railway, 336 miles in length, from Cincinnati to Chattanooga. The legislation consists of the original act entitled "An Act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants," and is found in 66 Ohio

Laws, p. 80. This act took effect May 4, 1869. It was followed by a number of supplementary acts conferring various powers essential to the completion and leasing of the railway line. None of these acts except the original act need be considered by the court. The original act is printed as an appendix to this brief. A summary of the act is as follows:

It provided that whenever in any city of the first class having a population exceeding one hundred and fifty thousand inhabitants the city council should by resolution declare it essential to the interest of such city that a line of railway, whose name should be stated in the resolution, should be provided between termini designated in said resolution, but one of which termini should be the city passing the resolution, it should be lawful for a board of trustees, to be appointed as provided in the act, to borrow as a fund for the purpose of providing such railway, a sum not exceeding ten millions of dollars, and to issue bonds therefor in the name of the city, bearing interest at a rate specified, payable principal and interest at the times and place to be designated by the board of trustees, and that said bonds should be secured by a mortgage on the line of railway and its income, and by the pledge of the faith of the city, and by a tax to be annually levied by the council of the city sufficient to provide for the payment of interest and a sinking fund to redeem the bonds at maturity; but no money should be borrowed until after the question of providing the line of railway specified in the resolution should be approved by the voters of the city.

The act conferred power upon a court described in sufficiently general terms to appoint five trustees who should be called trustees of the railway, using as a designation of the railway the name given to the railway in the adopted resolution.

The trustees so appointed, and *their successors,* were required to expend the funds provided by the sale of the bonds, in constructing a single or double track railway, with all the usual appendages, including a line of telegraph between the termini specified, and to that end such trustees were given power to do all acts necessary to accomplish the purpose.

The act made the trustees a board, and required them to choose a president from their number, and provided that a majority should constitute a quorum, and that the board should hold regular meetings, and have an office in the city under whose actions they had been appointed, and required the board to keep a record of its proceedings and a full and accurate account of its receipts and disbursements, and to make report to the city auditor annually when requested by resolution of the city council. They were granted power to acquire land and other property necessary for the construction of the line of railway, by eminent domain or by purchase.

The Superior Court of Cincinnati, on June 30, 1869, appointed the first board of trustees, consisting of five persons. That board was organized in the manner required by the statute; and the defendants named in the present bill of complaint as members of that board are the duly appointed successors of the first set of trustees.

The Board of Trustees of the Cincinnati Southern Railway is an agency of the State of Ohio and not of the City of Cincinnati, although its creation is "for the attainment of Cincinnati's object and interest as decided upon by itself, in providing this railway." (*Thoms* v. *Greenwood,* 7 Am. Law Record, following p. 768.) All the powers of the board of trustees were conferred upon it by the State of Ohio, and the State required them to be appointed and qualified by and before a court of that State. The object in having a board of trustees and in having it appointed by the court was to secure "permanence of the agency and to avoid changeability such as the mutations of elections and opposing and conflicting opinions would bring about, to the inevitable injury and possibly total failure of the enterprise." The Board of Trustees, while holding the legal title to the property, are nevertheless to employ it primarily for their beneficiary, the City of Cincinnati, and secondly for the holders of the bonds which they have negotiated, and for the lessees of the railway when it shall have been put under lease. These interests have the right to have this board of trustees permanently maintained in order to subserve the interests which the board has in charge.

The State of Tennessee, by an Act of its General Assembly, passed January 20, 1870, entitled "An Act to authorize the extension and construction of the Cincinnati Southern Railway within the State of Tennessee" (Chapter XLIII, Acts 1869-1870, p. 291), authorized the board of trustees of the Cincinnati Southern Railway to extend, construct and maintain, within the State of Tennessee, said line of railway, with a single or double track, and to exercise within the State of Tennessee all the powers vested in said trustee under said Act of May 4, 1869, of the General Assembly of the State of Ohio, and authorized the trustees to select a route for the railway, "commencing at a point within the City of Chattanooga to be selected by said trustees," and running through certain counties named, including the County of Hamilton in said State, to the northern boundary line of the State, so as to connect said line with the same line of railway in the Commonwealth of Kentucky.

This enabling act gave the trustees the right to acquire, by exercise of the power of eminent domain, or by purchase or gift, all lands and other property necessary for constructing and maintaining the railway.

The General Assembly of the Commonwealth of Kentucky, by its Act approved February 13, 1872, entitled "An Act to authorize the Trustees of the Cincinnati Southern Railway to acquire the right-of-way and to extend the line of railway through certain counties in this Commonwealth" (Chapter 272), granted rights and powers similar to those conferred by the Legislature of Tennessee just mentioned.

By August 26, 1878, the Cincinnati Southern Railway had been completed by the trustees from Ludlow, a point on the south bank of the Ohio river opposite Cincinnati, to Somerset in Pulaski County, Kentucky, a distance of 158 miles. At that time, from Somerset to Boyce's Station, Tennessee, a distance of 173.03 miles, nearly all the right-of-way for the Cincinnati Southern Railway had been secured and much construction work had been done and material distributed. On said August 26 a contract was duly entered into between the Trustees and R. G. Huston & Co. for completion of said railway from said Somerset to a junction with the Western & Atlantic Railroad at Boyce's Station, a point about five miles north of Chattanooga, so that by utilizing the rails of the Western & Atlantic Railroad from Boyce's Station into Chattanooga trains could pass from Cincinnati into Chattanooga. R. G. Huston & Co. promptly constructed that part of the road between Somerset and Boyce Station; and on May 19, 1879, the Trustees gave a determinable license to a company incorporated under the laws of Ohio, known as the Cincinnati Railroad Company, to operate the Cincinnati Southern Railway temporarily from Cincinnati to and into Chattanooga, the licensee company supplying the rolling stock for the purpose. That licensee company obtained entrance into Chattanooga from Boyce Station by means of the rails of the Western & Atlantic Railroad, the right to use which it secured by contract made September 6, 1879, with the Western & Atlantic Railroad Company, then lessee of the Western & Atlantic Railroad, whereby the Cincinnati Railroad Company was granted the right, for a period of two years from December 1, 1879, "to pass and repass, and have full and free ingress and egress with its engines, cars, officers, agents and servants to, over, upon and along the main and side-tracks, turnouts, switches, turn-tables, and other like conveniences of that portion of the said Western & Atlantic Railroad from said Boyce's Station into Chattanooga, including all connections with other railroads therein as far as said Western & Atlantic Railroad Company has the power to grant such privileges in connection with other roads, together with the right, so far as said Western & Atlantic Railroad Company can grant it, to use the passenger depot in Chattanooga, owned jointly by it, the Nashville, Chattanooga & St. Louis Railroad Company, and the East Tennessee, Virginia & Georgia Railroad Company." For these privileges a rental was paid by the Cincinnati Railroad Company to the Western & Atlantic Railroad Company.

The Cincinnati Railroad Company on February 21, 1880, operated the first through freight trains, and on March 1 following, the first through passenger trains, from Cincinnati to Chattanooga, passing its cars, locomotives, etc., over the rails of the Western & Atlantic Railroad between Boyce Station and Chattanooga.

But the Trustees of the Cincinnati Southern Railway were not party to the contract whereby its licensee, the Cincinnati Railroad Company, acquired this temporary right of passage between Boyce Station and Chattanooga over the rails of the Western & Atlantic Railroad. On the contrary, acting entirely apart from that arrangement, the Trustees of the Cincinnati Southern Railway, on June 28, 1879, located the *permanent* line of the Cincinnati Southern Railway between Boyce Station and the terminus in Chattanooga, and selected a route therefor that was parallel with and abutting the west right-of-way line of the Western & Atlantic Railroad from Boyce Station to the terminus in Chattanooga; and had secured the right-of-way therefor prior to October 8, 1879, the day on which the Legislature of the State of Georgia passed the Act known as the Grant of October 8, 1879, entitled "an act granting *right of way* to the Cincinnati Southern Railway where its route adjoins that of the Western & Atlantic Railroad" (Exhibit A, to Bill of Complaint, Rec., p. 11) and which enacts, after elaborate preamble, that "there is hereby *granted* to the Trustees of the Cincinnati Southern Railway, *for the use of said railway*, the use of that portion of the right-of-way of the Western & Atlantic Railroad between Boyce Station, Tennessee, and the Chattanooga, Tennessee, terminus that lies westerly of a line running parallel with, and nine and one-half feet westerly from the center of the track of the Western and Atlantic Railroad, so as to admit of laying track, if desired, near enough to the track of the Western & Atlantic Railroad to leave the distance between the centers of tracks fourteen feet, and between the nearest rails of the two railroads nine feet; provided always, that this grant is subject to the consent and approval of the lessees of the Western & Atlantic Railroad *as to the term* of their lease; provided further, that the grade adopted by the said Cincinnati Southern Railroad along and over the *aforegranted right-of-way* shall *always* be the same as that of the Western & Atlantic Railroad." [Italics ours.]

The consent and approval of the lessees of the Western & Atlantic Railroad to the foregoing grant was given.

On or about the 15th day of May, 1880, the Trustees commenced the construction of the Cincinnati Southern Railway from Boyce Station to Chattanooga on the right-of-way granted them by this Act of October 8, 1879, and completed it prior to October 11, 1881, at which time the whole line of the Cincinnati Southern Railway from Cincinnati to the terminus in Chattanooga, including the property in controversy in this case, was leased, under authority of Acts of the General Assembly of the State of Ohio, the principal one being the one passed March 18, 1881, entitled "An Act supplementary to the Act relating to cities of the first class, having a population exceeding one hundred and fifty thousand inhabitants, passed May 4, 1869," to the corporate defendant herein, the Cincinnati, New Orleans & Texas Pacific Railway Company, for a term of twenty-five years then next ensuing, at an annual rental graduated according to five year periods; the annual rental for the first period being $800,000 and for the last $1,250,000.

On June 7, 1902, this lease, by contract known as "Contract of Modification and Extension of Lease," was extended so as to expire October 12, 1966.

The constructing of the Cincinnati Southern Railway on the right-of-way granted to the Trustees by the State of Georgia October 8, 1879, involved a change of location of the Cincinnati Southern Railway. Not only that, it also involved large expense in adapting the ground for the purpose of a main line railroad track. That purpose required the widening of the Western & Atlantic embankments, the widening of its cuts, the lengthening of its culverts, putting in of new drainage, and the doing of much other work. The right-of-way of the Western & Atlantic Railroad was 66 feet wide, and that railroad, which consisted of but a single track, was laid with its center line as the center line of the right-of-way. As time passed, the Trustees of the Cincinnati Southern Railway, or their lessee, laid additional trackage upon the land covered by the said Georgia grant, and in connection with said additional trackage and said original main line track, established extensive terminal yards in Chattanooga. To accommodate certain public highways in the city of Chattanooga, expensive viaducts were constructed across the Western & Atlantic Railroad right-of-way between Boyce Station and Chattanooga. The cost of that part of the viaducts spanning said right-of-way was divided between these defendants and the State of Georgia, or its lessee of the Western & Atlantic Railroad, according to the width of that right-of-way which the State of Georgia had leased to the Nashville, Chattanooga & St. Louis Railway and the width it had covered by grant of October 8, 1879, to the Cincinnati Southern Railway.

All of the foregoing took place prior to August 21, 1916, the date on which the General Assembly of the State of Georgia undertook to repeal the grant of October 8, 1879, after it had been in force more than thirty-six years.

Promptly after the passage of that so-called repealing act (Exhibit C., p. 13, Bill of Complaint), the Trustees of the Cincinnati Southern Railway, on behalf of themselves and their lessee, The Cincinnati, New Orleans & Texas Pacific Railway Company, co-defendant herein, served notice upon the State of Georgia, and upon the Governor, and upon the Western & Atlantic Railroad Commission, protesting that the grant of October 8, 1879, was perpetual, and that the State of Georgia had no right to repeal the same, and disavowed holding that part of the Cincinnati Southern Railway by *permission* of the State of Georgia. (Exhibit "D", Rec., 14.) The evidence supporting the foregoing statement is contained in the stipulation found at p. 232 of the printed record.

ARGUMENT.

We will present our argument uninterruptedly, and afterwards take up such points in the brief of complainant as we think require specific notice.

I.

The principal question in this case is: Did the State of Georgia have the right to repeal this grant of October 8, 1879, or is the Act of its Legislature in attempting to repeal it void as being in contravention of Article I, Section 10 of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts?

The State of Georgia avers in her bill of complaint that this grant gave to the Cincinnati Southern Railway "*permission to use*" this portion of the Western & Atlantic right-of-way (Paragraph VI, Rec., p. 6). At another place in the bill of complaint it is described as a "*permission and license to use*" (p. 7); and at still another place (p. 8) as a "*permissive use.*"

We understand these allegations to be intended as an assertion that this grant could last no longer than the State of Georgia chose that it should last; and that it terminated whenever the State of Georgia said the word.

But we deny that this grant is subject to any such frailty; and deny that the grant is a delusion.

Our insistence is that the grant of October 8, 1879, is the grant of an exclusive easement in perpetuity in the land covered by the grant, and that it is a contract that can not be impaired by the State of Georgia.

The State of Georgia in her repealing act enumerated, *ex industria,* the reasons for attempting to repeal the grant (Exhibit C. to Bill of Complaint, Rec., p. 13). The reasons alleged are: (1) That the grant of October 8, 1879, was permissive only and at the pleasure of the State of Georgia; (2) Was granted to the Trustees of the Cincinnati Southern Railway and to said Cincinnati Southern Railway only; (3) The consideration moving the State of Georgia to make the grant was that the Cincinnati Southern Railway would be a grand trunk line of great benefit to the State of Georgia "forming a most important feeder and practically an extension of the Western & Atlantic Railroad which is the property of the State." The disappointments alleged are then set forth: (1) That the Cincinnati Southern Railway is no longer operated by the City of Cincinnati or the Trustees of the same to whom the grant was made, *"or their successors in trust,"* but has been leased for a long term of years to, and is operated by, a corporation known as The Cincinnati, New Orleans & Texas Pacific Railway Company, which lessee company is owned or controlled by railway interests competitive with the Western & Atlantic Railroad; (2) That the Cincinnati Southern Railway, leased and operated as stated above, is not an important feeder and practically an extension of the Western & Atlantic Railroad but is a direct, important and aggressive competitor with it for traffic moving between the south and west; (3) That the Western & Atlantic Railroad needs this right-of-way in its business; finally, (4) That The Cincinnati, New Orleans & Texas Pacific Railway Company is reputed to own ample right-of-way and property adjoining the right-of-way of the Western & Atlantic Railroad for a large part or all of the distance between Boyce Station and Chattanooga upon which its tracks could be easily and without great expense shifted and operated without materially affecting its entrance into the City of Chattanooga. For these reasons "the Act of the General Assembly, approved October 8, 1879, entitled 'An Act granting right-of-way to the Cincinnati Southern Railway where its route adjoins that of the Western & Atlantic Railroad,' be and the same hereby is repealed."

This display of reasons appears to us more in the nature of apology for attempted repudiation than as a statement of grounds sincerely believed sufficient to give to the State a right to terminate this contract. This enumeration of pretexts has, however, one value: it excludes the claim now made in complainant's brief that the State of Georgia has *no power* to make the grant of October 8, 1879. There is no room to question, and no question in the bill nor in the repealing Act is made, that the State of Georgia, through its Legislature, had power to convey this right-of-way to the Trustees of the Cincinnati Southern Railway. It is not a case where the State, in making this grant, was divesting itself of anything essential to performance of governmental duties.

The ownership of the Western & Atlantic Railroad by the State of Georgia is a commercial matter, and is not a governmental affair. This is so obvious that it would seem to require no argument or citation of authority to support it. Nevertheless, we may be pardoned for directing attention to the fact that the supreme judicial authority of the State of Georgia has repeatedly decided that this railroad ownership of the State of Georgia is a business adventure and in no sense an institution for the exercise of governmental function. In the case of *Western & Atlantic Railroad* v. *Carlton*, 28 Ga., 180, the Supreme Court of that State said:

> "When a State embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulations with persons engaged in the same cause."

It was decided in *W. J. Morrison et al* v. *Philip Cook*, 146 Ga., p. 570, at the March Term, A. D. 1916, of the Supreme Court of Georgia that:

> "The State's *ownership* of the Western & Atlantic Railroad is a business venture, and in *no sense* an institution for the exercise of governmental function." (p. 577, italics ours.)

These decisions but carry out the well recognized principle stated by this court in *United States Bank* v. *Planters' Bank*, 9 Wheat., 904, where Chief Justice Marshall said (p. 907):

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citi-

> zen. Instead of communicating to the company its privileges and its prerogatives, *it descends to a level with those with whom it associates itself,* and takes the character which belongs to its associates, and to the business which is to be transacted. * * * The State of Georgia, *by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character,* so far as respects the transactions of the Bank, and waives all the privileges of that character." [Italics ours.]

More than this, no claim that Georgia may make, that her ownership of that part of the Western & Atlantic Railroad situate in Georgia is sovereign, can be successfully made as to that part of the road situate in the State of Tennessee. Her ownership of that part of the railroad is controlled by the Statutes of Tennessee, under which alone she was "allowed the right-of-way" for her said railroad in Tennessee, and by which she was subjected to the *same restrictions,* as far as applicable, prescribed for the government of the Hiwassee Railroad and the Nashville & Chattanooga Railroad. (See Tennessee Acts, 1838 and 1848, Defendants' Answer, pp. 6 and 7; Rec., 20 and 21; Stipulation, Rec., 221, Original 408.) By those Acts she descended *to the level* of the Hiwassee Railroad Company and of the Nashville & Chattanooga Railroad Company, and *stripped* herself of any attribute of sovereignty so far as the ownership of that part of the railroad in Tennessee is concerned.

The direct question of the ownership of that part of the Western & Atlantic Railroad in Tennessee was before the Supreme Court of Tennessee in the case of *Western & Atlantic Railroad Co. v. Taylor*, 6 Heiskell, 408, wherein the court decided that with reference to the

State of Georgia's *ownership* of the Western & Atlantic Railroad such ownership was not in its sovereign or governmental capacity. And in the case of *East Tennessee, Virginia & Georgia R. R. Co.* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 51 S. W. Rep., 202, affirmed by the Supreme Court of the State, October 26, 1898, the court, among other things, said (p. 211, left-hand col. at top):

> "This is a suit concerning the administration of property of that State (Georgia) in Tennessee, for the purposes for which the right to enter the State of Tennessee was given. The Tennessee statute which extended rights to Georgia with regard to constructing the road in Hamilton County, this State, is found in Chapter 195, Acts of 1847-8." (Act quoted on page 7 of our Answer.) "That statute gives to the State of Georgia all the 'rights, privileges and immunities, with the same restrictions, which were previously granted to the Nashville & Chattanooga Railroad Company by the Act of December 11, 1845.' That Act is Chapter I, Acts 1845-1846. That Act includes among the rights and restrictions the right to sue and be sued. This includes, namely, the courts of Tennessee along with other courts."

That decision was made on the contention of the State of Georgia in a case involving ownership in Tennessee, that she was not a proper party to that suit, and was not suable in the courts of Tennessee.

Hence we felt justified in denying, as we did in our answer, some resounding allegations in the bill of complaint acclaiming the high sovereignty of the State of Georgia, particularly the allegation that the Western & Atlantic Railroad is owned by the State of Georgia "in its governmental and sovereign capacity," and that the property is part of the public domain.

THE GRANT OF OCTOBER 8, 1879, CONFERRED UPON THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY A PERMANENT USE NOT REVOCABLE BY THE STATE OF GEORGIA.

The grant of October 8, 1879, must be construed according to the rules of construction that would apply in case the grantor had been any ordinary railroad company acting by properly constituted authority, and the discussion must turn, not upon the power to make the grant, but upon the quantity of interest it confers. This is determined by the purpose the grant was to subserve which is expressed in it. The Trustees had already secured a permanent site for the Cincinnati Southern Railway, between Boyce Station and the Chattanooga terminus, which abutted the west line of the right-of-way of the Western & Atlantic Railroad. It is inconceivable that the Trustees would transfer their line of railroad from that secure location to the present site if they got no better title to it than a tenancy at will. No sane trustees would build five miles of main line of a great railroad on land from which they might be expelled at any time. It is inconceivable that the State of Georgia had such notion at the time this grant was made.

We take this grant by the four corners and look into it (Exhibit A, Rec., 11.) We see first the title, which is the part that is expressive of the thing that is being done. The Act is declared to be one "*granting right-of-way to the Cincinnati Southern Railway.*" "Right-of-way" for the main line of a railway which is proclaimed by grantor to be a "grand trunk line" must needs be *permanent;* and the grant of right-of-way for such purpose is in and of itself the grant of a permanent way.

We next see the first recital of the Act which says that "Whereas the City of Cincinnati has *nearly completed* the Cincinnati Southern Railway." And the Legislature of Georgia in effect puts in this at that point: "And by this act we furnish it means of *full completion*—the last link in the chain, the finishing touch." Why should the last link be less substantial and strong than the other links in the chain from Cincinnati down?

We now pass for the moment to the proviso at the end of Section 1. It says: "Provided further that the *grade* adopted by the said Cincinnati Southern Railroad along and over the *aforegranted right-of-way* shall *always* be the same as that of the Western and Atlantic Railroad." This is confirmation, strong as proof of holy writ, that *right-of-way*, not *mere permission*, was granted. And in providing that the grade to be built on that right-of-way "shall *always* be the same as that of the Western and Atlantic Railroad," we have evidence as convincing that this grant was to be of like duration with the Western and Atlantic Railroad. For how could the Cincinnati Southern Railway *always* maintain a grade of equal height with the Western and Atlantic Ralroad unless it *always* had a title that would enable it to do so?

Looking into other portions of the grant we see that it is recited that for the main part of the distance between Boyce Station and the termini of the two railroads in Chattanooga "their routes run parallel to and adjoining each other, a distance of about five miles." This reference to the subject of "routes" for railroads conveys to the mind the idea of something permanent. Again, the grant recites that "it is to the advantage of of both railroads to be able to locate their tracks and works close together, thus saving expense to one in construction, and to both in *maintaining the roadbed* and facilitating railroad operations." This reference is clearly to a permanent unity of tracks and works. How could a location of tracks and works of the Cincinnati Southern Railway close to that of the Western & Atlantic Railroad be of substantial benefit to either road if such proximity was to be only temporary? Again, how could *both* these roads be benefitted in *maintaining the* roadbed and facilitating railroad operations if the Cincinnati Southern Railway could be excluded at any time? How could the location of "tracks and works close together" give "*both* railroads the advantage of a stronger and firmer *roadbed* through a route subject to overflow by floods in the Tennessee river," if the tracks and works of the Cincinnati Southern Railway were not to be there permanently? In a word, there runs through the grant from beginning to end the idea of permanance which excludes all idea of a temporary arrangement. But there are other words in the grant that are of importance: The grant says "there is hereby granted to the *Trustees of the Cincinnati Southern Railway, for the use of said railway.*" Now, to be for the use of said railway it must last as long as the railway lasts. That seems self-evident. Again, the grant is to *Trustees* of the Cincinnati Southern Railway. It is familiar and fundamental that a grant to trustees gives them such an estate as is adequate to the execution of the trust. This is well stated in 1 Perry on Trusts (4th Ed.), Sec. 320, where the language is:

> "In the United States, the distinction between deeds and wills, in respect to the trustees' estate, has not been kept up; and the general rule is, that, whether words of inheritance in the

> trustee are or are not in the deed, the trustee will take an estate adequate to the exeution of the trust, and no more nor less. Courts will abridge the estate where words of inheritance are used, if the execution of the trust does not require a fee; *and so they will enlarge the estate if no words of inheritance are used in a deed.*" (Italics ours.)

This doctrine has of course been recognized by this court. In *Neilson* v. *Lagow et al*, 12 How., at p. 110, the opinion of Mr. Justice Curtis contains the following:

> "Now, on looking into the deed from the bank to the trustees, we find that the grant is to them and their successors, in trust, to sell and convey in fee simple absolute." (The trustees were individuals and not a corporation.) "The legal estate being in trust, must be commensurate therewith, and will be deemed to be so without the use of the usual words of limitation." (Citing cases.) "As the execution of the trust required the trustees to have a fee simple, in order to convey one, we are of opinion that the deed to them conveyed a fee, and consequently we can not infer that the State Court decided that only a life estate passed by the deed."

And in *Doe, Lessee of Poor*, v. *Considine*, 6 Wall., at p. 471, Mr. Justice Swayne uses this language:

> "When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary, it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustee, and the estate created. On the other hand, it is equally well settled that where *no* intention to the contrary appears, the lan-

> guage used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist, and his title becomes extinct. *The extent and duration of the estate are measured by the objects of its creation.*" (Italics ours.)

Now, the object of the trust reposed in the Board of Trustees of the Cincinnati Southern Railway was to construct a railroad from Cincinnati to Chattanooga. The carrying out of that trust required the Trustees to build that railroad on a foundation or roadbed to which they had durable title, because the road was a thing for all time.

The State of Georgia could not have intended that it should have power by mere exercise of its will to expel the Cincinnati Southern Railway at any time from this roadbed and appropriate the enormous outlay that the Trustees had made thereon in widening the embankments and the cuts and in lengthening culverts. At least, if the State of Georgia entertained such idea at the time the grant was made, her failure to avow it was highly dishonorable; and that thought can not be entertained for a moment.

The decisions construing contracts between railroads granting mutual running powers where the lines are so situated as to form a continuous route are of value in this discussion.

Llanelly Railway and Dock Co. v. *London and Northwestern Railway Co.*, L. R., 8 Ch. App., p. 942, is very instructive. A contract of the kind mentioned had been made between the two railroads whereby the London & Northwestern Railway Co. was given the power to run over and use with its vehicles the railway of the Llanelly Company and to use its stations, sidings and conveniences connected therewith, and there was a provision for dividing receipts and for supplying station facilities, clerkage, and the like. No time was fixed for the duration of the contract. After the railroads had operated under it for several years the Llanelly Company served notice that the contract would be terminated; and when the London & Northwestern Railway Co. refused to recognize the right to terminate the contract, the Llanelly Company filed its bill to have a declaration that the contract was at an end. The question in the case was whether the contract was terminable at the will of either party, or whether it was a contract in perpetuity. In a very able opinion by Sir W. M. James, L. J., we find this language at page 949:

> "The contention on the part of the Llanelly Company is, that this is an agreement determinable at will, or by reasonable notice. The contention of the London and Northwestern Railway Company is, that it is, as it is expressed to be, an agreement without any limit whatever in point of time. The case is in many respects similar to the case of the *Great Northern Railway Company* v. *Manchester, Sheffield and Lincolnshire Railway Company,* in which there were running powers given interchangeably between the railway companies, and the Vice-Chancellor held that they were given in perpetuity. In my opinion this case is not distinguishable on any sufficient ground from that case, which was decided as far back as the year 1851, *and has been considered to be the law from that day to this.* As that, however, was only the decision of a Vice-Chancellor, and as it has been contended before us that a great part of the *ratio decidendi*

in that case does not apply to this case, it is incumbent upon us to express our own opinions upon the matter as if no such authority existed; and upon general principles I have formed a very decided opinion that I should have arrived at the same conclusion as the Vice-Chancellor did in that case; and I should, if the thing were *res integra,* arrive at a similar conclusion in this case. I start with this proposition, that *prima facie* every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind; a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances or contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties.

"But I am of opinion that no such consideration applies to a case in which there is a grant, or an agreement in the nature of a grant, of a wayleave, or of running powers, which is only another mode, according to my view of it, of expressing a wayleave. In my view the implication is quite the reverse. A wayleave or running powers, determinable at will or short notice, would in my opinion be a delusion. Take the ordinary case of a wayleave. A colliery proprietor desires to have the power of working an adjoining coal field through his lessor's pit, or he desires to have a right of carrying his coals over a piece of land which intervenes between him and a seaport. With that view he enters into a negotiation with his neighbor or his landlord. I take it that both sides will, in so negotiating, know that what the man wants to have is a wayleave as permanent as the colliery, and both sides must be understood to be negotiating for that kind of wayleave which is the only thing that will suit the mine-owner's purpose.

"Then with regard to railways. The way in which running powers come to be negotiated for between railway companies is generally this: A railway company wants to establish through communication from point A to point B; it finds that there is an existing railway over part of the distance between those two points; it says to the other railway company, 'We do not wish to incur the expense of making so many miles of additional railroad, and we do not wish to come into competition with you, if you will let us utilize your line; what are the terms upon which you will let us use it?' Upon this the terms are negotiated. Both parties, in my opinion, must be understood to be negotiating for running powers *which will be an effectual substitute for that communication, for that independent line, which the parties seeking running powers would otherwise be minded to make or attempt to make*; that is to say, they are negotiating for running powers which are to be part of that permanent communication they desire to have between A and B; that is, for permanent running powers. That would seem to me to be the principle with which

> we must start in considering whether this agreement, which is in indefinite terms, means that the London and Northwestern Railway Company shall have power from time to time, and at all times, to run over and use with their engines, carriages, vehicles, and servants the lines of the Llanelly Company and their conveniences, or that they shall have such power only during the pleasure of the Llanelly Company. Then, when we come to look into the agreement, it appears to me that almost every line of it is full of permanence and adverse to the notion of its being revocable.''

And the learned judge proceeded to point out the things in that agreement that indicated permanence. There are not nearly so many of them, nor are they so strong as the things that indicate permanence in this Georgia grant. And so the court decided that the contract was not determinable by notice, and dismissed the plaintiff's bill, which dismissal was affirmed in the House of Lords (L. R., 7, Eng. & Ir. Apps., p. 550).

In *Great Northern Railway Co.* v. *Manchester, Sheffield and Lincolnshire Railway Co.,* 5 DeG. & Sm., 138, the language of the Vice-Chancellor, *in an opinion which has been the law ever since,* is worthy of earnest consideration. He said:

> ''Then, if we look at the substance of the agreement, there is a great number of the terms of the agreement which are obviously permanent terms; and it is clear that the agreement, as to many of the stipulations in it, leaves the two companies permanently in a different position to what they were before. One company agrees with the other that land is to be given up. The East Lincolnshire Railway Company agrees with

> the defendants that land is to be given up permanently to them upon certain terms; and, on the other side, the defendants enter into stipulations with the East Lincolnshire Railway Company, one of which is that they shall have facilities for convenient access to the Grimsby Docks; and there is also the stipulation in question that they shall have the right of running over the other line. Now, where you have an agreement of this kind, in which both the companies put themselves for value permanently in a different situation, it does appear to me it would be a very forced and unsound construction of the agreement to hold that, where there are permanent terms in it, putting the two companies forever in a different position to each other, you should construe other clauses which confer rights of great value upon the different companies, as creating rights which are only to continue during the will of either party." (See p. 147.)

Franklin Telegraph Co. v. *Harrison,* 145 U. S., 459, is an important case. The Franklin Telegraph Company owned a line of telegraph between New York and Philadelphia, and made a contract with a chemist firm known as Harrison Brothers & Co., whereby, in consideration of the relinquishment by the latter to the former of certain important rights, the Franklin Company granted to Harrison Brothers & Co. the privilege of putting up at its own expense a wire on the poles of the Telegraph Company between the cities named. The Franklin Company reserved the right to use the wire for its own business when it was not in use for Harrison's business; and in consideration of that, the Telegraph Company agreed to keep the telegraph line in good order at its own expense. The contract then provided that, after the expiration of ten years, the wire should become the property of the Franklin Company, and thereafter Harrison Brothers & Co. should pay $600 per annum quarterly to the Franklin Company. There was no time fixed in express terms for the duration of this contract. After a while the Telegraph Company served notice that the contract was at an end. Whereupon a bill was filed to enpoin the Telegraph Company from terminating the contract. The case was heard in the Circuit Court by Circuit Justice Bradley and Butler, J., and a final decree was entered, holding that Harrison Brothers & Co. were entitled, so long as the Franklin Telegraph Company, its successors or assigns, should keep up and maintain the line of telegraph between New York and Philadelphia, to an irrevocable license, subject to the payment of $600 per annum, payable quarterly. That decree was affirmed by this court. In considering the contract in the matter of its duration, Mr. Justice Harlan, delivering the opinion, said:

> "The contract limits the period during which appellees (Harrison Brothers & Co.) should be the *owners* of the wire, but does not limit the time during which they could, of right, use it in their business. If it was intended that Harrison Bros & Co.—having relinquished their valuable contract with the Insulated Lines Telegraph Company, and put up the wire at their own expense—should become, after ten years, only tenants from year to year of the Telegraph Company, that intention, it seems to the court, *would have been distinctly avowed.*" (Italics ours.)

That language fits this case completely. If the State of Georgia had said that this grant was determinable at will, the Trustees would not have given up their intention to build on their own right of way and have used this one. Georgia should not have left her intention respecting that vital point in any doubt whatever.

In United States v. *Baltimore & Ohio Railroad Co.,* 1 Hughes, 138, the Circuit Court of the United States for the District of West Virginia decided that a contract between the Secretary of War and the Baltimore & Ohio Railroad Company, granting that company permission to run its road through lands belonging to the United States at Harper's Ferry, Virginia, conferred a perpetual right upon the railroad company. At page 145 the court said:

> "The defendant accepted this license upon the terms indicated. It built and constructed its railroad under this authority. It was the extension of a great national highway, and as we now know, second to none in magnitude and importance in this or any other country. It must have been apparent to both the contracting parties that an enterprise at that time so stupendous in its character as the construction of a railroad from Baltimore to the Ohio River, was to be permanent and lasting. A right thus acquired, under a written license not specially restricted, is commensurate with the thing of which the license is an accessory."

And at p. 147:

> "I therefore conclude that, upon every principle, both legal and equitable, the complainants can not and ought not to be permitted at this late day to disturb the defendant in the possession of the premises under the agreement of 1838."

And in *The Junction Railroad Co.* v. *Ruggles,* 7 Ohio St., 1, it is decided that

> "Where a land owner granted a right of way to a railroad company organized under a charter in perpetuity, and the grant contains no limit as to time, the easement will be perpetual, unless terminated by release or abandonment."

In that case a landowner had executed to the Ohio Railroad Co. an instrument in writing (but not acknowledged nor attested by two witnesses as would be required in a deed to land to make it a legal instrument), which said:

> "I hereby quitclaim to said company so much of said land as said company are by their charter authorized to take for purposes of the location and construction of said road." (p. 2.)

As to the effect of that instrument in conveying an interest in the land to the railroad, the court said (p 5):

> "It wanted but a more formal execution to render it a legal conveyance of a perpetual easement in such lands as the grantee might appropriate in conformity to its terms. The Ohio Railroad Company having accepted the grant and complied with the conditions on which it was made, would, by virtue of this instrument, at least be entitled to enforce such legal conveyance; and regarding as done that which ought to be done, we treat the instrument, for the purpose of this suit, as if it were a formally executed legal conveyance. *The instrument itself containing no limitation as to time, the duration of the easement granted would be perpetual, unless terminated by a release or abondonment.*" (Italics ours.)

In *Wilson* v. *Chalfant*, 15 Ohio, 248, a landowner gave another the right to abut a milldam upon his land.

After the milldam had been constructed pursuant to the license, the landowner abated the dam; and in an action of trespass against him for that act the landowner pleaded that the abutment so demolished was upon his freehold. The effect of a replication filed was to make the question dependent upon whether the license to erect the dam was revocable or non-revocable, and the court said in characteristic fashion:

> "Whether the *locus in quo* was merely the right of the defendant in error to an easement in E. Wilson's land, or a freehold, it would not aid us, in this case, to inquire; but had he, in plain English, a right of possession as against the owner in fee, or (was he) a wrongdoer?"

And it was held that the license was irrevocable and the defendant landowner was liable in damages for the destruction of the dam.

Mississippi River Logging Co. v. *Robson,* 69 Fed. Rep., 773, decided by the Court of Appeals for the Eighth Circuit, furnishes a precedent for the construction of a contract like the one in question here. In that case Robson owned large tracts of pine lands located on the Chippewa and Flambeau rivers, branches of the Mississippi river. He also owned and operated a sawmill at Lansing on the Mississippi river, and obtained a supply of logs, to be sawn at the mill, from the lands in question. The Logging Company was, and for several years had been, engaged in the business of driving logs from these lands and the lands of others down the rivers to booms at the mouth of the Chippewa, and forming them into rafts ready for transportation to Robson's sawmill and to other points on the Mississippi. In the course of these operations in the past, differences had arisen between

Robson and the Logging Company; and for the purpose of "settling all said differences and providing for the future, it is mutually agreed as follows:" and then followed the provisions of the contract whereby the Logging Company agreed to take possession and control of all logs and timber which Robson should deliver to it in the rivers aforesaid, and to drive the same down the streams to the boom, not exceeding an average of two hundred and fifty millions of feet annually, the logs to be driven each season with reasonable care. The contract then provided a compensation to be paid at the close of each season's business, for taking the care, control and delivering the logs into the boom, and preparing them into rafts. The Logging Company continued to perform its contract for seven years, and then, insisting that it had the right to terminate the contract at will, gave notice of its purpose. Robson thereupon brought an action for damages. The defense of the Logging Company was, that the contract being silent as to the time during which it should remain in force, was determinable at its pleasure, or at least upon giving reasonable notice. But the court held that the contract was not so terminable, but that the intention of the parties was that it should last as long as Robson was actively engaged in removing the timber from the lands he then owned on the headwaters of the rivers mentioned, and the defendant continued to be in the business referred to. On this head the court said:

> "It is obvious, we think, from the relations of the parties and the circumstances under which the contract was executed, that if this idea that the contract might be terminated at the pleasure of either party had been suggested to the plaintiff or to the defendant, particularly to the former, prior to the execution of the agreement, it would

> never have been executed in its present form." (p. 778.)

And the court proceeded to point out that the Logging Company was engaged in this log driving business as a permanent business, and that it had practically a monopoly of that business, and that the only way that Robson had of getting his logs from his lands to his mill was through the employment of this Logging Company, and that the parties, having had disputes in the past, had entered into the agreement in order to secure the amicable continuation of the business. And looking to the whole purpose of the agreement, the court said (p. 781):

> "While the parties to the contract have failed to state how long it should continue in force, they have, nevertheless, manifested an intention to enter into a business arrangement with each other which should last for some years and until a certain expected event had occurred. We think, therefore, that the happening of that event should be held to limit the duration of the contract; and that until such time the Logging Company remains bound by its provisions."

The argument employed is applicable here. The grant in the case at bar recites that it is "to the advantage of both railroads to be able to locate their tracks and *works* close together," and thereby save expense "to one in construction and to both in maintaining *the roadbed.*" The unity of roadbed to be secured by this juxtaposition of tracks and works required for its accomplishment and continuance a title of equal duration in each railroad.

Western Union Telegraph Co. v. *Pennsylvania Co.*, 129 Fed. Rep., 849, a decision by the Court of Appeals for the Third Circuit, opinion by Honorable George Gray, is applicable. It involved the question whether a certain contract between the Telegraph Company and the Cleveland & Pittsburg Railroad Co. was terminable by notice, or whether it was a contract in perpetuity. By the contract the Cleveland & Pittsburg Railroad Co. agreed to erect a line of telegraph poles supplied with cross arms, along the line of its road from Cleveland to Rochester in Pennsylvania, and the Telegraph Company agreed to furnish wires, patents and everything else to complete the telegraph line between the points named, and also to extend one wire upon poles along the Ohio & Pennsylvania Railroad from Rochester to Pittsburg and put the line in operation as soon as practicable, and open offices at a number of points along the line of telegraph. The telegraph line was completed according to the contract, and was connected at its east and west ends with lines of telegraph extending in each of those directions. After the line of telegraph had been in operation for nearly fifty years, the railroad company served notice on the telegraph company that the contract would be terminated. The telegraph company filed a bill to enjoin the termination of the contract. The court below dismissed the bill on demurrer. An appeal was taken, and the decree of dismissal was reversed and a perpetual injunction was granted. The contract contained no limitation as to time; and the decision of the Court of Appeals was that from the circumstances of the case, in order to subserve the obvious purpose for which the contract was intended, it should be construed as granting a right in perpetuity. Among other things the court said (p. 858):

> "There is no express limitation in the contract itself as to the duration of the rights created by said contract, and it is a recognized doctrine of

> equity that no technical words of conveyance are necessary to create the interest intended to be created, if such intent clearly appears by the whole scope and tenor of the writing."

And after saying that it was of no importance to determine whether the contract created a technical easement, or a license executed, or otherwise to label it, the court added:

> "Accepting the conclusion at which the court below arrived, that no easement or interest in realty, as such, was created in favor of the complainant, we think it still remains to consider whether a correct interpretation of the contract, set forth in the bill of complaint, does not exclude the existence of any power of revocation, at the mere will of either party to the contract. Contractual relations of a permanent character may have been established, in the matter now before us, even though no easement or interest in realty were granted."

And in stating the reasons why the court considered contractual relations were of a permanent character, it said (p. 859):

> "The general purpose of the contract is easily arrived at. The telegraph company was extending its lines from the East to the West, and was naturally desirous, for that purpose, of obtaining a right of way, as direct as possible, one that would be protected, and form a link between its lines, east and west of the said Cleveland & Pittsburg Railway. The line of an established railway, like the Cleveland & Pittsburg Railway, would accomplish both these objects. It ran in the right direction, and its occupation and use for railway purposes afforded a protection not

> otherwise to be obtained, without great expenditure of capital. Moreover, the use of the right of way by the telegraph company created no possible interference with the operation of the railway. On the other hand, a telegraphic service was obviously necessary to the successful management of the railway. It needs no argument to show that this telegraphic service could be more economically obtained by an arrangement with a telegraph company that needed a right-of-way along its line, which could be maintained and used without any detriment to railroad operations, than by the expenditure of capital necessary to erect and equip, for its own use, a line of telegraph. So the railroad company agreed to fix and maintain a line of poles along its roadway, to be used by the telegraph company for stringing its wires, and the telegraph company agreed to furnish wire, insulators, instruments, patents, and everything except the posts and poles and cross-arms, and to complete said line with one wire and extend it upon the poles then up, or upon poles, equally as good along the Ohio & Pennsylvania Railroad from Rochester to Pittsburg, and put said line in operation as soon after the poles were set up as was reasonably practicable, and to open and equip offices at such places on the line as the said railroad company should designate."

And proceeding from that basis to evolve the intention of the parties, the court said (p. 861):

> "Such being the nature of the contract, and the circumstances surrounding it, as stated by the amended bill of complaint, we come to the question, is it in the power of either party, without the consent of the other, to terminate said contract and free itself from all obligation under it? We think it will sufficiently appear, from a

> careful consideration of the contract, with its modifications, as set forth in the bill, the circumstances attending its origin, the purposes had in view, and the conduct of the parties throughout the long period during which those purposes seem to have been accomplished, that there was no intention entertained by the parties to the contract, to limit its duraton, or confer upon either party, without the consent of the other, the right of revocation. If a contract is not revocable at the will of either party, or otherwise limited as to its duration, by its express terms, or by the inherent nature of the contract itself, with reference to its subject matter or its parties, it is presumably intended to be permanent and perpetual in the obligation it imposes. That the life of a contract should depend on the mere will of either party thereto, without the consent of the other, *is a limitation so important and drastic, that it is hard to conceive why, if the parties intended it, they should not express that intention in the contract itself.*" [Italics ours.]

Further on the court said:

> "The essential nature of the service is such as to indicate that permanency in contractual relation was intended by the contract under which these parties have lived for nearly half a century."

In the case at bar there was a mutuality of benefit accruing to both parties, as is manifested on the face of the grant. The only conclusion consistent with the situation revealed in the legislative Act is that the State of Georgia intended that the Cincinnati Southern Railway, in sharing this right-of-way, should have in the strip set apart to it an interest of equal dignity with that which the Western & Atlantic Railroad had in the other part.

Using the language of Mr. Justice McReynolds in *Northern Ohio Traction & Light Co.* v. *State of Ohio,* 245 U. S., at p. 585, we say: "It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution" of the State of Georgia. This Court held in that case that a franchise for an interurban electric railway without limitation as to duration, and in the absence of circumstances showing an intention to give or accept a mere revocable license, was a contract not subject to annullment at the will of the granting authority. Surely, the argument in favor of irrevocability is stronger where the grant is confessedly for "a grand trunk line" railway. And certainly there are no circumstances in this case to show an intention "to give or accept a mere revocable license," as we think we have clearly shown.

The argument of this court in the case of *Louisville* v. *Louisville & Cumberland Telephone Co.*, 224 U. S., at p. 663, is invoked here. The matter under consideration was the duration of the franchise granted by the City of Louisville to the Telephone Company permitting it to erect its poles and wires in the streets of that city. The court said (p. 663):

> "In considering the duration of such a franchise it is necessary to consider that a telephone system can not be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the

> charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the city and the utility and value of the entire plant would be thereby destroyed. Such a construction of the charter can not be supported, either from a practical or technical standpoint. * * *
>
> "The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the company to perform the perpetual obligation to maintain and conduct a telephone system in the city of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations."

The court cited a number of cases, among others the decision of this court in *Detroit* v. *Detroit Street R. R. Co.*, 184 U. S., 395, where it said:

> "Where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee."

This grant, it will be noted, was to "The Trustees of the Cincinnati Southern Railway," whch means not only those who were Trustees at that time, but those who should at any time thereafter answer that description. In other words, it was a grant to the Trustees of the Cincinnati Southern Railway *and their successors* as effectually as if the words "and successors" had been written immediately after the words "Trustees of the Cincinnati Southern Railway."

In *Boise Water Co.* v. *Boise City*, 230 U. S., 84, the question was whether an ordinance of Boise City, authorizing two individuals named "and their successors in interest in their water works" to lay and repair their water pipes in, through, along and across the streets and alleys of Boise City under the surface thereof, was a revocable license or a right in perpetuity. It was held by this court that it was not a revocable license, and that therefore a subsequent ordinance of Boise City, requiring the Water Works owners to pay a monthly license of three hundred dollars for the use and occupancy of the streets and alleys with said water pipes was void as an impairment of the obligations of a contract.

Speaking of the rights acquired under the ordinance, this court said (p. 90):

> "The right which is acquired under an ordinance granting the right to a Water Company to lay and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. It is assignable and will pass under a mortgage sale of the property and franchise of the Company which owned it." (Citing authorities.) "The grant was made in contemplation of the investment of large capital in the construction of a system of water works for the permanent supply of the city with water. The presumption is that no such enterprise would have been entered upon if the street easement was subject to immediate revocation."

In *Russell* v. *Sebastian*, 233 U. S., at p. 204, this court, speaking of a legislative grant by a State, said:

> "When the voice of the State declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover, the provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the State's offer, constituted a contract and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court."

While the Trustees of the Cincinnati Southern Railway may not be, technically speaking, a corporation, yet they have perpetual succession; that is to say, a succession as long as the City of Cincinnati owns the Cincinnati Southern Railway. The Tennessee enabling act, brought into the case by stipulation (Rec., p. 233), granted to the then Trustees "and their successors by the name of the Trustees of the Cincinnati Southern Railway" power to extend, construct and maintain, within the State of Tennessee, the Cincinnati Southern Railway line. And in the glossary clause of the Act it is provided, that "the word 'Trustees' shall mean the Trustees for the time being appointed under the said Act of the General Assem- of the State of Ohio, and shall include the Board of Trustees and their successors." But the real grantee was the City of Cincinnati, the beneficial owner, which was a corporation having in law perpetual succession.

It is not necessary to call attention further than has been done to the fact that the structures that the Trustees of the Cincinnati Southern Railway were to and did place on this ceded right-of-way were permanent in their nature, and required a large investment for their erection, construction and maintenance, and that the revocation by the State of Georgia of the right to maintain them would be a confiscation of a large amount of invested capital, a peril to which no sane road-builder would subject himself.

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S., at p. 103, this court quoted with approval the language used in the opinion of the court in *New Orleans* v. *Southern Telephone & Telegraph Co.*, 40 La. Ann., at p. 45, where that court said:

> "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well recognized doctrine of the authorities since the *Dartmouth College Case,* 4 Wheat., 518."

Other pertinent cases decided by this court are:

Old Colony Trust Co. v. *Omaha,* 230 U. S., at p. 112.
Grand Trunk Western Rwy. v. *South Bend,* 227 U. S., p. 544.
Detroit v. *Detroit Citizens St. Ry.*, 184 U. S., p. 395.

It makes no difference what name we call it by. When the Trustees pursuant to the grant of October 8, 1879, entered upon the land included in that grant and expended a large amount of capital in adapting the land to the intended uses, they acquired rights that can not be impaired by a repeal of the grant.

II.

REPEALING ACT VOID BECAUSE PROHIBITED BY ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES.

Every question that it would be necessary to discuss under this heading was settled by this court more than a hundred years ago in the case of *Fletcher* v. *Peck,* 6 Cranch, 87, and has remained so ever since. Pursuant to an Act of the General Assembly of the State of Georgia, passed January 7, 1795, lands belonging to the State were sold to James Gunn and associates, and one of the questions decided in the case was whether the title of John Peck, who had purchased a portion of these lands from the grantees of Gunn, was rendered null and void by an Act of the General Assembly of the State of Georgia passed prior to Peck's purchase, annulling and declaring void the Act under which the lands had been sold to Gunn and declaring void all deeds and conveyances disposing of said lands or any portion thereof, the pretext for the rescinding Act being that the original Act had been passed as the result of bribery and fraud. In considering the efficacy of the repealing Act this court, by Chief Justice Marshall, said, among other things (pp. 135, *et seq.*):

> "Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?
>
> "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature can not abridge the powers of a succeeding legislature.

"The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature can not undo it. The past can not be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and can not cease to be a fact.

"When, then a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law can not devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection. * * *

"The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia can not be viewed as a single, unconnected, sovereign power on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The Constitution of the United

States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

"Does the case now under consideration come within this prohibitory section of the Constitution?

"In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

"Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyance. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

"If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

"The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

"Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property *from the effects of those sudden and strong passions to which men are exposed.* The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Coustitution of the United States contains what may be deemed a bill of rights for the people of each state.

* * * * * * * *

"It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles

> which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

And so it was held that the Act under which the lands were graned was in nowise impaired by the subsequent repeal of that law, that repeal being void under the constitutional prohibition. And in the case at bar the repeal meets the same fate.

Other familiar cases are:

Farrington v. *Tennessee*, 95 U. S., 679.
New Orleans Gas Co. v. *La. Light Co.*, 115 U. S., 650.
Detroit v. *Detroit Rwy.*, 184 U. S., 395.
Louisville v. *Cumberland Tel. Co.*, 224 U. S., 658.
Grand Trunk Rwy. v. *South Bend*, 227 U. S., 544.
Owensboro v. *Cumberland Tel. & Tel.*, 230 U. S., 65
Old Colony Trust Co. v. *Omaha*, 230 U. S., 100.
Northern Ohio Traction & Light Co. v. *State of* Ohio, 245 U. S., 574.

III.

IN THE GRANT NO WORDS ARE FOUND INDICATING THAT IT IS TERMINABLE.

Nothing is said in the grant itself about its being terminable. The claim of the State of Georgia, that it is terminable at will by the state, is based on the absence from the grant of words of limitation usually employed when a deed is made in fee, such as "heirs or assigns" where the grantee is an individual, or "successors and assigns" where the grantee is a corporation. But, as we have shown, the absence of these words is not determinative; and without them a grant will be perpetual if such was the intention of the parties or if the purpose of the parties required that the grant be perpetual, or at least nonrevocable at the will of the grantor. The settled doctrine of this court is that, where a franchise or right-of-way grant is made to a railway for main line, and there are no words or circumstances limiting the duration of the grant, such grant is perpetual. (See 245 U. S., 574, and cases cited.)

This is particularly emphasized in the opinion in *Seaboard Air Line Ry.* v. *City of Raleigh*, 242 U. S., at pages 18 and 19, where the principle laid down is that where a corporation is clothed with duties which require a specified time or time in perpetuity for their performance, any right conferred upon such corporation which is essential to the discharge of such duties will be construed as having a like duration, in the absence of express limitation, although the right be not expressly conferred for a specified time or in perpetuity. Because the spur track in that case had been put down long after the construction of the railroad itself and under action of the board of aldermen which declared the authority given was a *"permission"* to occupy the sidewalk, and which was construed by this court to be on its *face* a mere license; and because the maintenance of such spur track had no essential or inherent relation to the maintenance of the railroad; and because the use which called it in being had ceased to exist, this court held that the original authority under which the spur track was laid was revocable. But that is a very different proposition from the one involved here. This grant is not characterized as a *permission*. On the contrary, the title of the act is "An Act *granting right of way;*" and in the granting clause itself the words of the grant are, "There is hereby *granted.*" These apt words go far beyond conferring a mere permission. In case at bar the grant was for construction and completion of the main line.

There is this further distinction: In the Seaboard Air Line case there was nothing in the ordinance or resolution creating a contractual relation, and nothing from which the licensor derived a benefit, and nothing constituting a consideration for the license; while in the case at bar there are certain duties and obligations imposed upon the grantee which are perpetual and which indubitably give it the character of a perpetual contract.

But the bill of complaint avers that the grant was made "upon the representation that the Cincinnati Southern Railway would form a most important feeder and become practically an extension of the Western & Atlantic Railroad, which was the property of the state, and give to the commerce of the state the advantage of a direct and admirable connection with the railway system of the north and west." (Bill of complaint, p. 7, par. VIII.)

And the bill alleges that the state had been deprived of that benefit because the Trustees of the Cincinnati Southern Railway had leased that railway to The Cincinnati, New Orleans & Texas Pacific Railway Company, and that that company became so controlled and managed in connection with an affiliated line, to-wit: the Southern Railway Company, that it turned out to be an active competitor of the Western & Atlantic Railroad for traffic between Cincinnati and Atlanta, and so the state had lost the benefit which it "reasonably anticipated" *from the representations made,* would flow to it.

As heretofore stated, we infer that the only object of these allegations is to show that the State of Georgia considered that she had a grievance that justified her in exercising her alleged option to terminate the grant; and that the state does not claim that failure to make good these alleged representations furnished independent ground for terminating the grant. Nevertheless we ask, whose representations were they upon which the State of Georgia built this colossal expectation? It is not averred that the Trustees of the Cincinnati Southern Railway made them. It is not averred that whoever did make them did not make them in perfect good faith. What benefit would accrue to the Western & Atlantic Railroad by completion of the Cincinnati Southern Railway, and how far it would be a feeder to that line, and how far the State of Georgia at large would derive benefits from that source, were subjects open to all, and on which every person had the right to bestow the energy of his imagination. And what the mutations of railroad management would be as time went on, and what course traffic would take as new affiliations and connections occurred, were matters which no one could foresee, but as to which chances had to be taken. Disappointment resulting from immoderate expectation should be borne in silence.

Equally futile is the talk about the grant being confined to the Trustees of the Cincinnati Southern Railway *and for the use of the Cincinnati Southern Railway* and not for the use of a lessee, as if there were or could be any restriction upon the right of the Trustees of the Cincinnati Southern Railway to lease this line of railway to an operating company. That the grant was expressed to be "to the Trustees of the Cincinnati Southern Railway *for the use of said railway,*" does not import a prohibition against leasing. It does not require that the Trustees should operate the Cincinnati Southern Railway. The personnel of the operator was not made a matter of importance. If the State of Georgia had informed herself, as presumably she did, she knew that the Ohio Legislature had given no power to the Trustees of the Cincinnati Southern Railway to operate the property after it had been completed and made ready for use. Their authority was to provide a railway and to put it under lease.

Section 4 of an Act of April 18, 1873 (70 Ohio Laws at p 140), gave power to the Trustees to "lease the whole line of railway for which they are Trustees." And Section 8 of an Act of April 18, 1878 (75 Ohio Laws at p. 118), gave the Trustees power "as fast as portions of the line for which they are Trustees are completed" to rent or lease temporarily the right to use and operate such portions upon such terms as they may deem best. So that this power to lease the Cincinnati Southern Railway was staring the State of Georgia in the face when she passed her Act of October 8, 1879. And on October 11, 1881, when the Cincinnati Southern Railway had been completed into Chattanooga, the last five miles being built upon the right-of-way granted by the State of Georgia, the entire line was put under lease for a term of twenty-five years to The Cincinnati, New Orleans & Texas Pacific Railway Company. How, then, can it be a matter of just complaint that the Cincinnati Southern Railway was leased to the company named? And if a matter of complaint, why was not the complaint made before it had been endured for thirty-six years?

AS TO THE CINCINNATI SOUTHERN RAILWAY BEING A PRACTICAL EXTENSION OF THE WESTERN & ATLANTIC RAILROAD.

The alleged representation that the Cincinnati Southern Railway would be practically an extension of the Western & Atlantic Railroad does not need much discussion. The Cincinnati Southern Railway is still there, and it is open for traffic of the Western & Atlantic Railroad as much as it ever was. Indeed, since 1906, at which time the Louisville & Nashville Railroad Company opened a through line from Atlanta to Cincinnati via Knoxville in competition with the Western & Atlantic Railroad, the Western & Atlantic Railroad has had no outlet for its traffic to points north of Chattanooga except by the Cincinnati Southern Railway. This was brought about by the fact that when the L. & N. opened its Knoxville line in 1906 it refused to co-operate at Nashville, Tennessee, in the haulage of northbound Western & Atlantic traffic, as it had formerly done.

The facts are shown by the testimony of George P. Biles (Rec., p. 207, *et seq.*), who testified as to the course of traffic between the two roads subsequent to 1888, the time at which he became Assistant General Freight Agent of the Cincinnati, New Orleans & Texas Pacific Railway Company: He showed that from Chattanooga to Atlanta and to points south and southeast thereof, the Western & Atlantic Railroad and the East Tennessee, Virginia & Georgia Railroad were competing lines; and that the Cincinnati, New Orleans & Texas Pacific Railway Company apportioned its Atlanta and via Atlanta traffic between these two roads, on a reciprocity basis. That course obtained up to and during the year 1890. At that date the State of Georgia committed her Western & Atlantic Railroad to interests competitive with the Cincinnati, New Orleans & Texas Pacific Railway Company, by the lease it made of the Western & Atlantic for a term of twenty-nine years, commencing December 27, 1890 (Rec., p. 266), to the Nashville, Chattanooga & St. Louis Railway, which was a line extending from Chattanooga to Nashville, where it united with the rails of the Louisville & Nashville leading north to Cincinnati, and in which company the L. & N. Railroad had large interests. That lease operated as practically an extension of the Western & Atlantic Railroad, and gave it a "connection with the railway system of the north and west" other than by the Cincinnati Southern Railway. Consequently, the Western & Atlantic routed its business by way of Nashville and Louisville, and thus diverted it from the Cincinnati Southern Railway. Naturally, the Cincinnati, New Orleans & Texas Pacific Railway Company, in turn patronized the East Tennessee, Virginia & Georgia line for its Atlanta and via Atlanta business, as far as it could lawfully do so. This traffic diversion, made by the Western & Atlantic, continued until 1906, at which time the Louisville & Nashville Railroad opened its own line from Atlanta to Cincinnati via Knoxville; and, in order to get the entire haul from Atlanta to Cincinnati and to increase the volume thereof, it refused to co-operate as it had previously done at Nashville in the haulage of traffic from Atlanta to Cincinnati and points beyond.

The stand thus taken by the Louisville & Nashville forced the Western & Atlantic to resume patronage of the rails of the Cincinnati Southern Railway north of Chattanooga. But the Cincinnati, New Orleans & Texas Pacific Railway Company, having in the meanwhile established connection at Chattanooga with the Southern Railway (successor to the East Tennessee, Virginia & Georgia) for its Atlanta and via Atlanta business, did not feel called upon to disturb that arrangement in favor of the Western & Atlantic simply because it had been coerced in the manner stated by the Louisville & Nashville Railroad. And while it may be that the Cincinnati Southern is not now as good a "feeder" of the Western & Atlantic as formerly, yet that result is not the fault of the Cincinnati Southern. And the fact remains that, but for the Cincinnati Southern, the Western & Atlantic would now be entirely cut off from railway connection with Cincnati and with the north and west through it, "that admirable connection" which the Western & Atlantic forsook when it could do so with advantage.

IV.

THE CINCINNATI SOUTHERN RAILWAY IS ABSOLUTELY DEPENDENT ON THIS RIGHT-OF-WAY.

The State of Georgia also avers in her bill of complaint (p. 15, Rec., p. 10) that "the Cincinnati Southern Railway is no longer dependent upon or requires the use of the right-of-way of the Western & Atlantic Railroad in order to afford it convenient and adequate entrance into the city of Chattanooga, as was the case at the time the state gave permission to use its right-of-way for that purpose. Hence it is that a discontinuance of the unlawful use and occupation by the defendants of the right-of-way of the Western & Atlantic Railroad would work them no injustice and impose no hardship upon them, nor in any way impair their ability to adequately and efficiently serve the public as a common carrier."

This statement exactly reverses the conditions. To repeal this grant would break off the Cincinnati Southern Railway at Boyce station, and leave its southern terminus in the air. The proceeds of bond issues for the completion of the Southern Railway were exhausted with the completion of the road into Chattanooga on the right-of-way granted by the State of Georgia, which marked the closing of the construction account of the road. At the time the State of Georgia granted the right of way to the Cincinnati Southern Railway, that railway was not dependent upon that roadbed for a Chattanooga entrance. The evidence in the case shows that prior to the date of the grant the Trustees had located the Cincinnati Southern Railway between Boyce Station and Chattanooga, and had acquired a right-of-way for that route; and nothing remained to be done except to grade and place the track thereon (Rec., p. 188). Then came this grant which announces that it was made for the advantage of both railroads, and that it would save expense to the Cincinnati Southern Railway in matter of construction, and expense to both in maintaining *the* roadbed, by making it stronger and firmer in a flooded territory.

But the Cincinnati Southern Railway having built its main track railroad on this right-of-way, a double track for much of the distance, and having adjusted its yards to that condition, and numerous viaducts having been constructed which materially interfere with any track readjustments, the Cincinnati Southern Railway is at this time *absolutely dependent* upon and *does absolutely require the use of this right-of-way;* and it would not only be a gross injustice but would wreck the Cincinnati Southern Railway to require it to "discontinue" this roadbed. (See evidence of Curtis Dougherty, Rec., 188-9 and 204 and photographs 1, 2, 3 and 4.) The State of Georgia undertook to prove by the evidence of Mr. J. H. Johnston, engineer in charge of the engineering work of the Western & Atlantic Railroad Commission, which in turn has charge of this case, that the tracks of the Cincinnati Southern Railway "at present on the right-of-way of the Western & Atlantic Railroad could be easily shifted to its own adjacent right-of-way" (Rec., p. 45). Although the question was put in that grossly leading form the witness answered with commendable reserve, "I believe they *could be* built on their own right-of-way, yes, sir." And when cross-examined he explained that he only meant it was a physical possibility to shift the track, and that in saying it could be done, he spoke "regardless of the question of cost or inconvenience" (Rec., p. 57).

THE WESTERN & ATLANTIC HAS AMPLE ROOM.

The State of Georgia further says she was not at the time this grant was made needing the portion of the right-of-way ceded by the grant, but that she does need it now. If that were so it would be no reason for annulling the grant. But we show not only that she has ample room for the construction of another and additional line between Boyce and Chattanooga on the east side of her present roadbed (Daugherty, Rec., 192-3), but that there was no urgent need for more room for the Western & Atlantic Railroad between Boyce station and Chattanooga at the time this bill was filed is conclusively shown by the fact that the Nashville, Chattanooga & St. Louis Railway, which had a lease upon the Western & Atlantic Railroad running from 1890 to December 27, 1919 (Rec., 266), did on February 16, 1917, the day on which the bill was sworn to, execute and deliver to the State of Georgia a deed (Rec., 99) whereby it did surrender to the State of Georgia all right, title and interest, if any it had, in and to this 23½-foot strip, being the subject in controversy herein. If that railway finds it entirely convenient to operate the Western & Atlantic between Boyce station and Chattanooga without this 23½-foot strip, how can the State of Georgia claim, in fairness, that that 23½-foot strip is essential to the operation of said line?

ALLEGED ENCROACHMENTS.

Another allegation of the bill of complaint is, in effect, that our occupancy under this grant overlaps the grant on the east or left-hand side as you go to Chattanooga, by two and one-half feet; and the allegation is that there never was authority for it. This allegation is contained in paragraph VII of the bill of complaint (Rec., p. 6). Complainant's way of alleging the encroachment is to charge the defendants with occupying a right of way twenty-six feet wide west of a line drawn *seven* feet west of and parallel to the center line of the Western & Atlantic Railroad, whereas the grant operates only west of a line *nine and one-half feet* west of said center line. There is no such encroachment or overlap as charged. The matter is explained in paragraph VII, page 10, of defendant's answer (Rec., p. 23), and what is there alleged is substantiated by the evidence of Curtis Dougherty (Rec., pp. 184-5).

It will be observed that the grant is to be of such nature "as to admit of laying track, if desired, near enough to the track of the Western & Atlantic Railroad to leave the distance between the centers of tracks fourteen feet and between the nearest rails of the two railroads nine feet."

The evidence of complainant's engineer, J. H. Johnston, concedes that the respective tracks were laid and are maintained with fourteen feet between centers, and that the nearest rails are nine feet apart (Rec., p. 48).

If in operating cars over rails so located, the sides of the cars at any time overlap the east line of this grant, such overlapping is a lawful incident of the grant. *Quando lex aliquid concedit, conceditur et id sine quo res ipsa esse non potest.*

And the same may be said of the work of the respective track forces which, in co-operating to maintain a continuous covering of ballast on top of the embankment, spread the material and take care of it up to the median line between the two railroad tracks, which happens to be two and one-half feet east of our east line. In fact, the counsel for complainant admits in the record (pp. 184-5) that the Cincinnati Southern tracks are not laid nearer the Western & Atlantic tracks than the grant authorized.

VI.

FLOODED DISTRICT.

The State of Georgia called evidence to the effect that the roadbed of the Western & Atlantic Railroad was not liable to injury by overflow of the Tennessee river, *which the grant, in effect, recites was the case.* We can not see why this attempt was made in the evidence to stultify the state which had solemnly asseverated the fact that to locate their "tracks and works close together" would give "to both railroads the advantage of a stronger and firmer roadbed through a route subject to overflow by floods in the Tennessee river." Our difficulty in apprehending the purpose of this evidence is increased by the fact that no allegation that the region was not subject to overflow nor that overflow did not injure the railway is made in the bill of complaint, and no such reason for rescission is set forth in the repealing act, which shows great industry in the search made for excuses. We insist that the state is estopped now to deny the truth of a fact so solemnly asserted nearly forty years ago. Therefore, we objected to the evidence as immaterial, but nevertheless felt compelled to call evidence to contradict it.

The evidence on this immaterial point forms a large part of the record. The witness, F. W. Wrampelmeier, a civil engineer called by the defendants, made a careful study of the height of the floods of the Tennessee river on this part of the route of the Western & Atlantic Railroad at various times, beginning as far back as 1867 and coming to the present time. He obtained his data from the records made by the United States Government at Chattanooga showing heights of floods above the Government gauge in the Tennessee river at Chattanooga at various dates. From these data he made a hydrographic sheet showing stages of water in the Tennessee river beginning with 1873, which he gives in his evidence (Rec., pp. 169-72). His testimony for 1867 is based upon the 1867 Weather Bureau statistics. He also shows how high up the side of the railroad embankments the flood waters would reach through the section in question. He shows that at the lowest stage of water he had taken, 16 feet above zero, the water would just reach the toe or foot of the railroad embankment for a lineal distance of six or seven hundred feet. At a height of 28 feet the water reached six of the embankments for a total length of 1,350 feet; being for part of that distance five feet up on the embankment; "and on the big fill it would be as much as fifteen feet." At a stage of 38 feet the water would come up from one to 22 feet for a length of 7,370 feet. At a stage of 43 feet the water would come up to the top of the ties and the base of the rails for a distance of a mile; and at a stage of 52 feet, which was the height of the water in 1886, it would be nine feet over the track from 1,700 feet south of Boyce Station to "Well, clear on down to Chattanooga." He says that the highest water ever known was in 1867, when the stage was 58.95 feet, which made the water nearly 16 feet above the top of the track (Rec., 174-6).

The hydograph compiled by this witness shows that in 1875 the water was 54 feet, which would make it 11 feet over the track of the Western & Atlantic Railroad.

So that in 1879, when the grant in question was passed by the Georgia Legislature, *there had been a good deal to impress the State of Georgia with a sense that this part of the route was subject to injury by overflow from floods in the Tennessee river.* As a fact, the evidence shows that that part of the Western & Atlantic Railroad had been subject to overflow from floods of the Tennessee river as far back as recorded history goes, and that it is still subject to such overflow, the last instance being the one in 1917. So that the State of Georgia was entirely accurate in the assertion she made in the grant of 1879.

It is in the testimony (see Curtis Dougherty, Rec., p. 193) that water standing against the side of an embankment is as injurious, if not more injurious to the stability of the embankment than water that overflows it. The evidence shows that the widening of the roadbed by the Cincinnati Southern Railway protects the Western & Atlantic part of the embankment from infiltration of water in times of flood, and from the washing of the side of the embankment. Such protection is very valuable (Rec., 184).

The witnesses, Pennebaker (Rec., p. 114, original 216), Stegall (Rec., p. 123), Ray (Rec., pp. 126-7), Doyle (Rec., pp. 130-1), Hickson (Rec., p. 135), Ribble (Rec., p. 140), Gorman (Rec., p. 145), Wheelock (Rec., p. 151), and Nixon (Rec., p. 157) were eye-witnesses of these floods, except the one of 1867. Some of these witnesses saw only some of the floods, but the remaining witnesses saw the floods the others did not see. Some of them testified to the bad effect these floods produced upon the embankment. They saw where the railroad embankment had been washed away. They specify particularly a section of the bank opposite the north end of the National Cemetery as a part that suffered most. The current was so strong that it carried away part of the cemetery wall. Some of these witnesses rode in boats over this right-of-way from near Boyce all the way to the Stanton House in Chattanooga.

It is important to note that the witness Hickson (Rec., p. 135) speaks of the flood of 1875 as entirely overflowing the Western & Atlantic Railroad, and as seeing the railroad embankment washed out and the track "swayed down and the ties washed up;" and the witness Nixon (Rec., p. 157) speaks of that flood as having put the Western & Atlantic Railroad out of business for at least ten days and as being entirely over that roadbed. The flood of that year has an important bearing because it occurred not long before the passage of the Act of 1879 by the Georgia Legislature, and effects of that flood on the roadbed of the Western & Atlantic had not then been forgotten.

VII.

BOTH THE STRIP ON THE WEST SIDE AND THE 1750 FOOT STRIP ON THE EAST SIDE ARE COVERED BY GRANT OF OCTOBER 8, 1879.

The State of Georgia divides the land, which she seeks by this action to recover from the defendants, into two parts: (1) A strip on the west side of the track of the Western & Atlantic Railroad extending from 480 feet south of Western & Atlantic mile post 132 towards Chattanooga for a distance of 19,537 feet, and for a width of 26 feet except at the beginning and ending points.) We have heretofore explained the error in claiming that this width is 26 feet instead of 23½): (2) A strip south of the last named strip but on the eastern side of the Western & Atlantic Railroad, which is described as extending from Magnolia Street in Chattanooga to Gas Street, a distance of 1750 feet excepting at the beginning and ending points.

These two parcels are plainly indicated on the map (Exhibit B.) attached to the bill of complaint. The 1750 foot strip extends for about an equal distance on either side of the Western & Atlantic mile post 136. In reference te this 1750 foot strip, we understand the claim of the State of Georgia to be that it was not included in the grant of 1879, and that the defendants have no title to it from any source. The State of Georgia claims that the grant of 1879 is confined to land lying on the west side of the Western & Atlantic Railroad. That part of the Answer of Defendants touching this subject begins with the middle paragraph on page 12 of the Answer and with the first paragraph on page 24 of the printed record. The defendants insist that they have title to this 1750 foot strip under the grant of October 8, 1879, although it is not on the west side. The defendants insist that the controlling and dominating purpose of the grant of October 8, 1879 was to afford the Cincinnati Southern Railway access to its terminus in Chattanooga. That terminus was so located that a railway approaching the Western & Atlantic Railroad on its west side had to cross that Railroad at a convenient point and proceed on the eastern side along the Georgia right of way in order to reach the terminus which was the objective named in the grant. Enjoyment of the grant made it necessary to cross the Western & Atlantic Railroad and proceed in the way mentioned. The right to do that was an incident of the grant.

The second Whereas in the grant clearly discloses a purpose to confer upon the Cincinnati Southern Railway such right of way as would conduct it to its terminus on the *Eastern* side of the W. & A. Railroad. That clause recites that the "said Railway" (Cincinnati Southern) "reaches the Western & Atlantic Railroad at Boyce's Station and for *the most of the distance* to the termini of the two Railroads in Chattanooga their routes run parallel." It will be observed that it does not say that they are parallel for the entire distance between Boyce's Station and the Chattanooga terminus of the Cincinnati Southern; yet, taken literally, the description of the thing granted is the use of "that portion of the right-of way of the Western & Atlantic Railroad between Boyce's Station, Tennessee, and the Chattanooga, Tennessee, terminus that *lies westerly*" of a line nine and a half feet west of the center of the track. The Chattanooga terminus of the Cincinnati Southern not being on the westerly side of the Western & Atlantic Railroad, the purpose of the grant is not fulfilled, unless it is made to include by construction the right to cross over and to use enough width on the east side to reach the Chattanooga terminus.

The Georgia grant (October 8, 1879) was subject to the consent and approval of the lessee of the Western & Atlantic Railroad, which lessee was the Western & Atlantic Railroad Company, which had a lease for a twenty-year term begining December 27, 1870 (Rec. 225, par. XI.).

The minutes of this lessee Company, under date of November 20, 1879, show that the lessee Company gave its consent that the Cincinnati Southern Railway "build its track from Boyce's Station to Chattanooga on the right of way of the Western & Atlantic Railroad, upon the terms and conditions specified in the said Act of the Legislature, and upon the further condition *that the crossing* of the track of the Western & Atlantic Railway at Chattanooga be made in a manner satisfactory to the President and General Manager and Superintendent of this Company" and that "all the details of the connections and other matters necessary to complete the work to be referred to the President and General Manager and Superintendent of this Company with power to act." And it is stipulated in this case that said work was completed accordingly (Rec. p. 238, par. VI). This minute is very significant as being so near the time of the passage of the 8th of October grant, and as showing that at that time it was contemplated and understood that the terminus on the *eastern* side of the W. & A. Railroad had to be reached by a cross-over and tracks leading thence.

The building of the Cincinnati Southern Railway from Boyce's Station to Chattanooga on this granted right of way was completed in the summer of 1881 (Rec., 235, bot. of page): and this crossing of the Western & Atlantic in Chattanooga was made at that time as part of the completion of the Cincinnati Southern Railroad (see testimony of Isaac Pennebaker, Rec., p. 114, original paging 215, Jacob Smith, Rec., p. 121, original 227; R. B. Stegall, Rec., p. 122, original 229).

The original profile of the Cincinnati Southern Railway locates this crossing at station 13573+94,, which was 2882 feet north of the north line of Market street in Chattanooga (Rec., p. 173, original 319), and 785 feet north of Western & Atlantic mile post 136 shown on the map attached to the bill of complaint in this case (idem). The crossing led into the 1750 ft. encroachment alleged in this case at its north end (Rec., 174), and the tracks thence continued on the alleged encroachment to the shops and terminal grounds; and the tracks have been on that 1750 ft. ever since. (Jacob Smith at Rec., pp. 120, 121; R. B. Stegall, Rec., p. 122; Wrampelmeier, Rec., p. 173, Isaac Pennebaker pp. 113-114.)

Curtis Dougherty, Chief Engineer of Maintenance of Way of The Cincinnati, New Orleans & Texas Pacific Railway Company, says in his testimony (Rec., pp. 186-7):

> "Q. Well, now according to what you know and according to what you have learned from the records of the Cincinnati, New Orleans and Texas Pacific Railway Company, how long has the Cincinnati, New Orleans and Texas Pacific Railway Company occupied that 1750 foot strip on the east side?
>
> A. Up to the present time?
>
> Q. Well, up to the time, we will say up to the time of the commencement of this suit, which was in April, 1917?

A. Why, a period exceeding thirty-five years.

Q. What do you know about the location of the original crossing of the Cincinnati Southern Railroad, from the west side of the Western and Atlantic Railroad to the east side of the Western and Atlantic Railroad?

A. It was in existence at the time I began service with the C. N. O. and T. P. So far as I recall at present, I recall its location, that is in a general way and had occasion to know about it because I helped to plan the change in location.

Q. Yes, well, where was that, what do you know about the Crossing in its original condition?

A. Well, of course in the very original condition the condition in which it was first installed, I don't know. That was before my time, but I was familiar with it before its location had been changed, though some slight changes had been made in the details of the crossing itself.

Q. But while it was in the same location?

A. But while it was in the same location.

Q. Well, what were those changes in the details, of that original crossing?

A. When I first saw the crossing it was constructed according to what is termed, in track language, a double slip crossing, which serves the purpose not only of a straight across crossing, of tracks but also of a switching connection from one to the other. The records show that the original crossing was constructed on a plan of what was known as 'switch in and switch out' arrangement, which was merely and simply switches. That seems to have been later replaced by this more modern crossing. a double slip crossing, and that change was merely to a little more modern method of doing the same thing.

Q. What was the location, now, of the

terminal facilities on the east side of the Cincinnati Southern originally with reference to this crossing and with reference to the tracks running from that crossing, on the east side of the Western and Atlantic Railroad?

A. The property acquired by the Cincinnati Southern provides for terminal facilities at Chattanooga laying to the east and south of the right of way of the Western and Atlantic and extending from a short distance north of this crossing, in a southwesterly direction to Market Street, and entirely on the south and east of the Western and Atlantic Railroad.

Q. What was that crossing used for; going to what place?

A. The crossing was used for the purpose of getting from the main track of the Cincinnati Southern, as it was located and constructed and used, on the west side of the Western and Atlantic over to this terminal property, which was on the east side of the Western and Atlantic, necessarily a crossing of the Western and Atlantic had to be made in order to accomplish that.

Q. Were these tracks that you speak of as being on the east side of the Western and Atlantic connected with that crossing, at that crossing?

A. They were.

Q. They were, then. practically a part of that crossing?

A. The track that,—the Cincinnati Southern Track that crossed the Western and Atlantic at this crossing led to these other tracks by switch connection.

Q. And those tracks led to the terminal facilities on the east side?

A. Exactly so.

Q. Now there is an interlocking crossing where is that located?

A. Some distance, probably a thousand feet north in railroad parlance, of the original crossing.

Q. It is about East End Avenue, is it?

A. It is near East End Avenue, what we we know as the East End Avenue interlocking plant.

Q. Well, that accommodates the track crossing from the west side of the Western and Atlantic over to the east side and leading into the terminal passenger station at Chattanooga, does it?

A. Into the terminal passenger station and also into the same terminal property.

Q. Yes, and to those same tracks that were on the east side?

A. The same tracks that were on this east side. They have been extended up to this East End Avenue interlocking crossing."

And this witness testified on cross-examination that the building of the track across the Western & Atlantic from the west to the east side and the building of the tracks on the east side of the Western & Atlantic right-of-way was done as a part of the construction of the Cincinnati Southern Railway from Boyce Station into Chattanooga under the grant of October 8, 1879. His answer to a question is: "The construction proceeded right along from the west side over on the east side and to these terminals as a continuous proposition, yes." (Rec., p. 199.)

Although the location of this crossing was afterwards changed to a point further north, in order to meet modern necessities, yet the trackage has continued to be on the alleged encroachment all the time.

We insist that the meaning intended by, and that was placed upon the 8th of October grant, is that the right-of-way conveyed by that grant should continue on the west side only until it reached a point where it was necessary to cross over to get to the located terminus of the Cincinnati Southern and there it would transfer to the other side and so reach that objective, being the terminus referred to in the grant and to reach which the right of way was granted.

We emphasize the fact that the grant itself recognizes that in passing from Boyce station into Chattanooga the the respective termini of the Western & Atlantic and Cincinnati Southern would not be reached on lines that would be parallel all the way. Thus was a diversion necessarily contemplated.

It is also to be noticed that the grant, in designating the beginning and ending points of the ceded strip, fixes Boyce Station as the beginning and "the *Chattanooga Tennessee terminus*" as the ending point. The terminus thus referred to is that of the Cincinnati Southern Railway.

Moreover, it would have been inappropriate, as will be seen from an inspection of Map B. attached to Bill of Complaint, to have described the right of way granted as lying for *the entire distance* on the west side of the Western & Atlantic, for the reason that at the point of crossing, the Western & Atlantic Railroad takes a turn to the west, and therefore there was no west side beyond that. Nevertheless, the grant goes on to the terminus.

Our adversary says the Trustees overlooked getting a grant for the east side. But not so. The grant was deemed sufficient for both sides. The claim of our adversary is important, however, as containing the admission that the grant to be efficient had to be on the east side to the extent named.

[NOTE: The terminals of the Cincinnati Southern Railway at Chattanooga must not be confounded with those used by the Cincinnati Railroad Company, determinable licensee, under its contract of date September 6, 1879, whereby it obtained from the Western & Atlantic Railroad Company, lessee of the Western & Atlantic, the right, for a period of two years commencing December 1, 1879, to "pass and repass and have full and free ingress and egress with its engines, cars, officers, agents and servants to, over, upon and along the main and side tracks, turn-outs, switches, turn-tables, and other like conveniences, on that portion of the Western & Atlantic Railroad from said Boyce Station into Chattanooga * * *, together with the right, so far as said Western & Atlantic Railroad Company could grant it, to use the passenger depot in Chattanooga used and occupied jointly by it, the Nashville, Chattanooga & St. Louis Railroad Company and the East Tennessee, Virginia & Georgia Railroad Company." The passenger depot thus spoken of was that commonly known as the Union Depot fronting on Ninth Street in Chattanooga. It is the depot spoken of by the witness Pennebaker (Rec., 113, Original p. 214), and by the witness Smith (Rec., 120, Original p. 226].

STATUTE OF LIMITATIONS.

But if we should be mistaken in our claim that the grant of October 8, 1879, gave the right to use the 1750-foot strip on the east side of the Western & Atlantic Railroad, we rely for such right upon the statute of limitations of the State of Tennessee, as set forth at page 13 of our answer (Rec., p. 24, par. VII).

The State of Georgia, as the owner of this railroad property, is liable to the operation of the statute of limitations and is affected by the doctrine of estoppel and by all other equitable considerations, to the same extent as any private corporation or any individual owning this property would be. This is so, first, because, when the State of Georgia came into the State of Tennessee with this Western & Atlantic Railroad, she doffed her sovereignty and took the right to construct that railroad in Tennessee on the terms laid down by the State of Tennessee in the Acts of 1838 and of 1848, respectively, and the Acts referred to therein, namely, the charters of the Hiwassee Railroad Company and of the Nashville & Chattanooga Railroad Company. (See Defendants' Answer, pp. 6 and 7; Rec., pp. 20 and 21; Original pp. 44 and 45). It will be remembered that by the Act of 1838 the State of Georgia was "allowed the right-of-way for the extension and construction of her said railroad from the Georgia line to the Tennessee river, and that she shall be entitled to all privileges, rights and immunities (except the subscription on the part of Tennessee) and be subject to the *same restrictions* as far as they are applicable as are granted, made and prescribed for the benefit, government and direction of the Hiwassee Railroad Company." And in the Act of 1848 it is provided that "all the rights, privileges and immunities, with the *same restrictions* which are given and granted to the Nashville & Chattanooga Railroad Company by the act of the General Assembly of this State, incorporating said company, passed December 11, 1845, are, so far as they are applicable, hereby given to and conferred upon the State of Georgia, to be enjoyed and exercised by that State in the construction of that part of the Western and Atlantic Railroad, lying in Hamilton County,, Tennessee, and in the management of its business."

The Hiwassee Act was offered in evidence and is Exhibit No. 9, Record, page 258. The Act incorporating the Nashville and Chattanooga Railroad Company was offered in evidence and is Exhibit No. 7, Record, page 248.

The State of Georgia, by accepting these acts and availing herself of the benefit of the same, submitted to all the restrictions to which the Hiwassee Railroad Company and the Nashville and Chattanooga Railroad Company were subject, which would include the operation of the statute of limitations, the operation of the doctrine of estoppel, and the operation of every other legal or equitable consideration that would be applicable to an ordinary subject; and by accepting these acts she descended to the same level as that occupied by the Hiwassee Railroad Company and the Nashville & Chattanooga Railroad Company, and there is no reason for saying that all of these restrictions were not applicable to the State of Georgia as much as they were applicable to those railroad companies.

In the case of *East Tennessee, Virginia & Georgia Ry. Co.* v. *Nashville, Chattnooga & St. Louis Ry. Co.,* 51 S. W. Rep., 202, hereinbefore cited, the Supreme Court of the State of Tennessee decided that under the statute of 1848 the State of Georgia was liable to be sued in Tennessee respecting matters pertaining to this Western & Atlantic Railroad. By the same token it necessarily follows that the same restrictions as to the statute of limitations and estoppel would apply. So that, if it be supposed that the State of Georgia had the right to avail herself of the maxim *Nullum tempus occurrit regi,* she has waived that right in the manner aforesaid. And by consenting to be sued, as the State of Georgia did by these Tennessee Acts, she consented to have her causes of quarrel between her and others decided as they would be "between man and man." We quote on this subject the language of this court in *United States* v. *Arredondo et al,* 6 Pet., at p. 711, where this court, speaking of restrictions incurred by the United States growing out of her assent to be sued, said:

> "By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between *man and man,* on the same subject-matter."

But regardless of these statutes of Tennessee, the State of Georgia, in respect of matters pertaining to the ownership of this railroad, is not a sovereign but is a subject. This has been directly decided by the Supreme Court of Georgia (*Morrison* v. *Cook,* 146 Ga., at p. 577, hereinbefore cited), and is the result of other well considered cases.

In *Bank of Tennessee* v. *Dibrell,* 3 Sneed at p. 381, the court said:

> "The doctrine that when a state becomes a common carrier by means of railroads owned by itself or otherwise, or banker or in any other mode enters into the common avocations of citizens, or private companies or corporations, that it throws off its sovereignty, has become too well established to allow of argument at this day."

It is also well established that where a state thus divests itself of its attribute of sovereignty it loses its immunity from the statue of limitations.

In 19 Am. & Eng. Encyl. (2d Ed.), p. 190, it is said:

> "GOVERNMENT IN ORDINARY TRADE RELATIONS. Where the government divests itself of its attributes of sovereignty and enters into ordinary trade relations, it loses its immunity from the statute and is governed by the same relations as an individual under similar circumstances. Thus, the United States as owner of the bank of the United States was subject to the ordinary statutes of limitation, and the same rule applies to a state as owner of a state bank."

To the same effect are:

Bank of United States v. *McKenzie,* 2 Brockenbrough, at p. 401.
State of Alabama v. *Gibson's Admrs.,* 6 Ala., at p. 816.
Calloway v. *Cossart,* 45 Ark., at p. 88.
Brown v. *Trustees of Schools,* 224 Ill., 186, *et seq.*

In Wood on Limitations (4th Ed.), at p. 167, it is said:

> "But where the state becomes a partner with individuals or employes in business it divests itself of its sovereign character and is subject to the statute."

Time has never been and is not yet when the State of Georgia permitted the public to ride free on this railroad. And the claim that she owns the road in a public capacity and as a sovereign for the benefit of the public—in some sort as a King's Highway—is a gross fallacy.

The *situs rei* being in Tennessee, the statute of limitations of that state applies. The applicable statute is:

> "4458. No person, or any one claiming under him shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued." (Defendants' Answer, par. VII, Rec., 25.)

Occupancy by these railroad tracks and their continuous use and operation would constitute adverse possession. Although at the time the occupancy commenced it was by consent of the Western & Atlantic Railroad Company, lessee of the Western & Atlantic Railroad, yet its lease expired December 27, 1890. At that time the bar to Georgia's possession which that lease had presented was removed.

Decisions of the Supreme Court of Tennessee holding that a seven years' possession is protected by this statute, are:

Heiskell v. *Cobb,* 11 Heiskell, at top of p. 645.
Jones v. *Perry,* 10 Yerger, at p. 82.
Rutherford v. *Franklin,* 1 Swan, 323.

VIII.

NO EQUITY JURISDICTION.

A court of equity has no jurisdiction in this case. If the grant of October 8, 1879, was terminated by the act of August 21, 1916 (Rec., 13), which is the contention of the State of Georgia, the title to and right of possession in the strip mentioned in that grant reverted *ipso facto* to the State of Georgia unaffected by the unexpired lease made to the Nashville, Chattanooga & St. Louis Railway of date July 19, 1890, for a term of twenty-nine years next ensuing December 27 of that year (Rec., 266), which lease being subsequent in date to said grant of October 8 would not cover what the State had previously disposed of by said grant. Such is the view taken by the learned counsel for the State of Georgia in this case. On February 13, 1916, he made a report to the Western & Atlantic Railroad Commission in which, among other things, he said:

> "Under the Act of 1889 the State leased to the Nashville, Chattanooga & St. Louis Railway for a term not yet expired, 'The Western & Atlantic Railroad, together with all of its houses, work shops, rolling stock, depots and appurtenances of every kind and character.' It is to be observed that the description was indefinite and general and did not undertake to define the particular character or extent of the properties constituting the Western & Atlantic Railroad. The State did not in that lease, nor does it ever, warrant title or convey anything more than such title, right or interest *as the State at the time may have.* Nor is there any special covenant that after acquired property or subsequent additions shall come within and be included in the terms of the contract of lease. At the time of this lease the Cincinnati Southern Railway was using and occupying that portion of the right-of-way now in dispute, *under authority from the State of Georgia to do so.* That possession and use was in its nature exclusive; so that the lessee from the State did not acquire *any right to its possession or to its use, or any interest therein or control thereover.* In my opinion it therefore follows that not only title, but also the right to present possession and use of this property, resides *exclusively* in the State and that the State alone is the proper party to assert this right in any proceeding that may be necessary

to recover possession and use." (Italics ours. Complainant's Exhibit B, Rec., 241-2.)

But to remove any conceivable doubt, the learned counsel for the State of Georgia in this case took the precaution to procure from the Nashville, Chattanooga & St. Louis Railway, lessee, on February 16, 1917, a deed of surrender to the State of Georgia of said lease, as far as said strip was concerned, "in the event the said lease should be construed as vesting in or transferring to the lessee any right to possession, use, occupation or enjoyment of said parcel of land hereinabove referred to (the 23½ foot strip) *in presenti* or *in futuro.*" (Complainant's Exhibit A, Rec., 99.)

Mr. Jno. Howe Peyton, then President of the Nashville, Chattanooga & St. Louis Railway, who executed said deed of surrender, testified at Record, page 102 (Original, 193), that this deed was executed and delivered in order to be rid of any obstacle that the lease to the Nashville, Chattanooga and St. Louis Railway, which expired in 1919, might present to the maintenance of this action by way of constituting an outstanding right of possession, and that it was executed out of abundant caution, although his General Counsel, Mr. Claude Waller, advised him that it was not necessary. Mr. Peyton then testified that there was no understanding whatever that, in case the State of Georgia recovered this strip of 23½ feet wide by four or five miles long, the Nashville, Chattanooga & St. Louis Railway should have any interest whatever therein. (Rec., 102; Original, 194.)

It appears, therefore, that if the repeal of August 21, 1916, was effective, the State of Georgia, prior to the commencement of this suit on March 19, 1917, had title to and right of possession in this strip of land, and consequently had an adequate remedy at law to recover the same. Such being the case, the State of Georgia can not recover that possession through the medium of an injunction, as she is trying to do in this case.

This court said in *Lacassagne* v. *Chapuis,* 144 U. S., at p. 124:

> "The plaintiff was out of possession when he instituted this suit; and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff, by injunction, to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. 1 High on Injunctions, (2d Ed.), sec. 355. The question here involved is a dispute about title. The plaintiff has a full, adequate and complete remedy at law, and the case is not one for jurisdiction of a court of equity."

And in *22 Cyc.* p. 828, the text is as follows:

> "(III) *Recovery of possession.* An injunction is not the proper method of evicting a party from the actual possession of land. Nor will an injunction be granted when its effect would be to take possession from defendant if the complainant's title has not been established at law. An injunction will not be granted against a defendant who is claimed to be in wrongful possession of property who is not doing irreparable damage, since the remedy at law by ejectment is ample and complete."

IX.

Nor can this bill be maintained as a bill *quia timet,* the complainant not being in actual possession.

Frost v. *Spitley,* 121 U. S., 556, where the language of this court is:

> "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill can not be maintained without clear proof of both *possession* and legal title in the plaintiff." (Citing *Alexander* v. *Pendleton,* 8 Cranch, 462; *Piersol* v. *Elliott,* 6 Pet., 95; *Orton* v. *Smith,* 18 How., 263; *Crews* v. *Burcham,* 1 Black, 352; *Ward* v. *Chamberlin,* 2 Black, 430). "As observed by Mr. Justice Greier in *Orton* v. *Smith,* 'Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.' 18 How., 265. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his tittle is legal, his remedy at law, by action of ejectment, is plain, adequate and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment. *United States* v. *Wilson,* 118 U. S., 86. *Fussel* v. *Gregg,* 113 U. S. 550."

ANSWER TO COMPLAINANT'S BRIEF.

We now answer such parts of complainant's brief as have not been already sufficiently answered.

Counsel for complainant seeks to distinguish the case of *Northern Ohio Traction Co.* v. *State of Ohio,* 245 U. S., 574, and the general line of authorities there cited establishing the proposition that a grant to a public utility corporation continues as long as the public service required of such corporation is to be performed, by claiming that in this case the State of Georgia was not interested in the construction of the Cincinnati Southern Railway from Boyce Station to Chattanooga; that the physical connection between the two lines could be made at Boyce station, and that the extension of the Cincinnati Southern Railway from that point into Chattanooga was a superfluous thing so far as the State of Georgia is concerned. And as supporting that contention he tries to show from the evidence that a proposed physical connection between the two roads north of Boyce is indicated by an embankment for a wye track, and by the acquisition of some land suitable for yards. To sustain that he relies upon the opinion evidence of his witness Hunter McDonald (Rec. 63 and 64) who speaks of there being vestiges of a partly built embankment visible now; that is to say when the weeds are not too rank. But if these evidences exist they only manifest that that place for connecting with the Western & Atlantic Railroad was abandoned and that the connection between the two roads at Chattanooga was substituted therefor, in the interest of better exchange facilitiies. This is apparent from the testimony of complainant's witness Sams (Rec., 92 and 93) who distinctly shows that the yard facilities for exchange of freight between the two roads was and is at Chattanooga; and that although there is still some exchange at Boyce, it is only limited, and that the preferable place for exchange facilities was and is Chattanooga, where the facilities are much better; and that the doing exchange business at Chattanooga is a mutual convenience to both roads.

It is evident, therefore, that if there was ever a project entertained between the two roads of an exchange north of Boyce, it was abandoned, and exchange at Chattanooga was substituted therefor, which evidently in large measure led to the enactment of this grant in 1879.

But in addition to that, the State of Georgia bargained for in its grant, and in fact got, the benefit resulting from the widening and extending its railroad embankments on the Tennessee river side from Boyce to Chattanooga by the Cincinnati Southern Railway. And there is a provision in the grant that "the grade adopted by the said Cincinnati Southern Railroad along and over the *aforegranted right-of-way* shall *always* be the same as that of the Western & Atlantic Railroad." (Rec. 12). Into this compact the Cincinnati Southern Railway entered when it accepted this grant, and its terms have been fully and literally complied with from that time to this. One purpose of this proviso was undoubtedly flood protection to the Western & Atlantic Railroad. The grade provided for could only be maintained by a fill that would insure to that railroad the protection which the Legislature of Georgia deemed advantageous. That the maintenance of such a grade is a valid consideration for a grant would hardly seem to require argument. This was an advantage that the State of Georgia assured itself of receiving, and has ever since received. That it is a substantial advantage is shown by the testimony of Curtis Dougherty, Engineer Maintenance of Way of the Cincinnati Southern Railway, who says, among other things:

> "Q. What is your opinion as to whether or not the widening of the Western and Atlantic Railroad roadbed from Boyce Station to Chattanooga that took place by reason of the construction of the Cincinnati Southern Railway, in the place where it was constructed, was a benefit to the Western and Atlantic roadbed?
>
> A. My opinion would be that it was a benefit."

And at the same place he said:

> "Q. Mr. Dougherty, what do you say about the effect on the embankment of the Cincinnati Southern Railway, from Boyce to Chattanooga, of flood waters that come up on the embankment and not reach to the top of the embankment?
>
> A. I consider them objectionable from a maintenance standpoint, something that is to be avoided if practicable. The presence of water around a railroad embankment is, according my experience, objectionable."

He then explains that the objection consists in expense incurred in restoring conditions that are interfered with by water; that the water has a tendency to wash away material in the embankment which must be replaced at expense; that his experience is, in many cases, that damage did occur from water; and from these erosions the embankment of the Western & Atlantic is protected by the intervening embankment of the Cincinnati Southern Railway.

The same testimony is given by James Hickson (Rec., 135) and by many other witnesses called by the defendants.

It will not do, therefore, for the complainant at this late day to undertake to show, as it is undertaking to show by the testimony of its witness, Hunter McDonald, that the Cincinnati Southern Railway embankment and construction is of no benefit to the Western & Atlantic Railroad.

The witness James Hickson testified (Rec., 135) that when the Western & Atlantic Railroad was built "it was kind of narrow, wasn't very wide, may be twelve or fifteen feet on top where the ties were, just room for the ties, and a little room for you to walk on outside of the ties, so when the water came in there, that was soft dirt and naturally washed away between the ties, I suppose it was four or five feet higher than the railroad at that time, and pieces of drift wood would catch over there and stick."

And again he said that at one point he remembered after a flood of being out there "and seeing the tracks where the flood had done washed out from under it and it swayed down and the ties washed up on the right-of-way and all."

The witnesses, William Doyle (Rec., 133), W. H. Ray (Rec., 126), R. B. Stegall (Rec., 123), Isaac Pennebaker (Rec., 115), Peter Gorman (Rec., 145), William Nixon (Rec., 157), William E. Wheelock (Rec., 151), and John H. Ribble (Rec., 141), to whose evidence we have already called the attention of the court, all gave testimony showing that the floods of the Tennessee river injuriously affected the railroad embankments between the points in question.

Another claim in the brief is that the case of *Seaboard Air Line Ry.* v. *City of Raleigh,* 242 U. S., 15, is favorable to complainant's contention. But it is not so. We have heretofore shown that that case is a direct authority in favor of our contention because the construction of the Cincinnati Southern Railway under this grant was essential to and became part of the enterprise of building the Cincinnati Southern Railway into the City of Chattanooga, which was by law made its southern terminus. The Cincinnati Southern Railway never intended to and could not have stopped at Boyce station; and the fact is obvious that the State of Georgia, through its Western & Atlantic Railroad, was interested in the Cincinnati Southern Railway's being built into Chattanooga, not only for the sake of securing better exchange facilities, but also because the State of Georgia would derive the additional advantage of improving and bettering its roadbed.

The grant can not be termed a "nude pact," nor be compared to an unused grant as was involved in the case of *New York Electric Lines* v. *Empire City Subway Co.*, 235 U. S., 179, cited by counsel for complainant. Nor can this main line track be likened to the little old spur track that was involved in the Seaboard Air Line case. That spur was not a component part of the line.

THE GEORGIA CONSTITUTIONAL QUESTION.

Another contention made in our adversary's brief is that this grant of October 8, 1879, was a donation by the State of Georgia to the Cincinnati Southern Railway, and that therefore it is prohibited by a Georgia constitutional provision which says that "The General Assembly shall not by any vote, resolution or order, grant any donation or gratuity in favor of any person, corporation or association."

In answer to this claim we have to notice that now at the end of nearly forty years it is the first time that anybody has ever thought of this point. No such question is raised in the bill of complaint. No such question is found in the August 21, 1916, repeal act which is prolific in its recital of reasons and excuses for its attempt to repeal this grant. To give the point validity would also assume an ignorance on the part of the Legislature of the State of Georgia in regard to its own Constitution that is inconceivable. They were able men in the Georgia Legislature when that grant was made, among them the speaker of the House, who afterwards became a distinguished figure in national politics and an honored Senator from the State of Georgia. But such grant was not a donation or gratuity. The constitutional prohibition against legislative donations does not apply to a grant made for the purpose of securing an improved physical condition of the state's property and which required as a consideration that the grantee construct and maintain a specified work for the protection of that property. The grant was a business arrangement made by the State of Georgia with the Cincinnati Southern Railway for the improvement, betterment and protection of the state's property.

Another point made by our adversary under the Constitution of Georgia is that this grant constituted a sale of part of the Western & Atlantic Railroad, and that a sale of the railroad could not be made except for money the proceeds whereof were to be devoted to a specified purpose. The answer to that is that this was no sale of any part of the Western & Atlantic Railroad. It does not lie in the mouth of our adversary to claim in one breath that it was a mere license revocable at will, and in the next breath to claim that it was an out-and-out sale. The transaction was simply the advantageous devoting of a part of the right-of-way to the protection of the remainder of the right-of-way; and it merely imposed on part of the Western & Atlantic right-of-way a kindred servitude in favor of the Cincinnati Southern Railway in return for value rendered by the latter.

Moreover, if the grant was void *ab initio*, as is the claim of the complainant now for the first time made, the possession of the Cincinnati Southern Railway since 1881 has given it a title not only by the statute of limitations, but also by estoppel, for certainly at this late date, in view of all the expense the Cincinnati Southern Railway has incurred, the State of Georgia would be estopped from setting up this constitutional defect, if it existed.

THE GRANT OF OCTOBER 8, 1879, WAS A GRANT OF NEITHER A FREEHOLD NOR OF A REVOCABLE LICENSE.

Our adversary contends that the grant in question was the grant of a freehold and presumably a sale of a part of the railroad property. But it was not the grant of a freehold, but of a right-of-way—permanent, of course. It was the grant of the *use* of the strip, not of the strip itself. A right-of-way for a railroad is a right of passage over the land and the right to adapt the land to the purposes of such passage.

I Elliott on Railroads, § 5. 2 id., § 415, at p. 558.
Jones on Easements, § 211.
42 Cen. L. J., p. 156.
Williams v. *Western Union Ry. Co.*, 50 Wis., at p. 76.
C., I., St. L. & C. Ry. Co. v. *Geisel*, 119 Ind., at p. 78.

In this last case the court said:

> "The grant of a right-of-way is the grant of an easement and implies that the fee remains

in the grantor. A person who has a right-of-way has nothing more than a right of passage, and can not be the owner of the *corpus* of the land."

ACT READ IN LIGHT OF SURROUNDING CIRCUMSTANCES.

Our adversary argues that reading the act in the light of surrounding circumstances it is a revocable license. On the contrary, the surrounding circumstances—which by the way can only be resorted to where there is ambiguity, which is not the case here—show that this grant is and had to be a grant in perpetuity. The attending circumstance which overtops all others is that the grant was to supply roadbed for a great trunk line railway! It was to supply a component part of a grand unit. To attempt to fritter away the effect of that fact by the claim that the roadbed supplied was merely a provisional one to be used only until the Trustees of the Cincinnati Southern Railway could find something better, or was granted merely to expedite arrival in Chattanooga, is a flat failure. The Cincinnati Southern Railway Trustees, at the very time that this act was granted, had already acquired another right-of-way, and it would have taken but little, if any longer, to complete the line on that route than upon the route adopted by influence of this grant.

The claim that the grant must be read as temporary because it left the State of Georgia only 42½ feet out of a 66-foot right-of-way has no merit. The evidence shows that throughout the distance from Boyce to Chattanooga, or at least for the greater portion thereof, the Western & Atlantic Railroad did not then have and has not since had, more than one track. It also shows that there is ample room on the Georgia right-of-way for at least two additional tracks on the east side of the Western & Atlantic Railroad track.

Certainly at the time this grant was made the Legislature of Georgia could not have had in contemplation any further use of its right-of-way at this point, and therefore had no thought of making the grant provisional.

TERMS OF THE GRANT. THE GRANT ITSELF CONTAINS WORDS OF PERPETUITY.

Our adversary claims there are no words of perpetuity in this grant. We point out again that there are such words of perpetuity. Significant words showing perpetuity run through the whole grant. They begin with the caption, which denominates the Act of the Legislature as "An Act *granting right-of-way* to the Cincinnati Southern *Railway.*" Words of greater significance could not have been used. "Right-of-way" in and of itself implies perpetuity when it is for a main line railway unless those words are controlled by express limitation.

Then we find in the granting clause itself the words "There is hereby *granted* to the Trustees of the Cincinnati Southern Railway, for the use of *said railway.*" It does not say for the temporary use of the Cincinnati Southern Railway; it does not say for the use of the Cincinnati Southern Railway until it can build on another right-of-way; it does not say that it is an emergency grant, but it means that it is for the use of the Cincinnati Southern Railway absolutely and for an unlimited duration.

Then we come to the proviso which says, "that the grade adopted by the said Cincinnati Southern Railroad along and over the *aforegranted right-of-way* shall *always* be the same as that of the Western & Atlantic Railroad." Here we have a repetition of the statement that the grant was a *right-of-way* grant and no limitation is added, but, on the contrary, there is a reqiurement that the grade of the Cincinnati Southern Railroad should *always* be the same as that of the Western & Atlantic Railroad. Now "always" does not mean for a little time, nor for a short time, but it just means *always*. This is conclusive evidence that the Legislature of Georgia did not have in mind any kind of abbreviated grant.

Another fact—less significant but still important—is that the grant in question is conditioned upon obtaining "the consent and approval of the lessees of the Western & Atlantic Railroad as to *the term* of their lease." The lessee spoken of was the Western & Atlantic Railroad Company whose lease began December 27, 1870, and extended for twenty years then next ensuing; so that at the time of the making of the grant in question that lease had over eleven years to run. If this grant of October 8, 1879, had been as temporary as our adversary now contends it was, it would not have required that the lessee consent that the Cincinnati Southern should occupy for eleven years.

Our adversary also argues that if the Georgia Legislature had intended to confer other than a temporary or revocable use upon the Cincinnati Southern Railway, it would have employed some such word as "perpetual" or "forever" in the grant itself. This is backwards reasoning; for if the Legislature of Georgia had intended to grant a use that would be revocable at its will, it would have made that intention appear *distinctly* in the grant itself.

In the case of *Franklin Telegraph Co.* v. *Harrison,* 145 U. S., at p. 469 (*supra*), this court, speaking in regard to such a point, said:

> "If it was intended that Harrison Bros. & Co. —having relinquished their valuable contract with the Insulated Lines Telegraph Co., and put up the wire at their own expense—should become, after ten years, only tenants from year to year of the Telegraph Company, that intention, it seems to the court, *would have been distinctly avowed.*" (Italics ours.)

And so we say that if the Legislature of Georgia had had any such intention as counsel now attempts to attribute to it, such intention would have been distinctly avowed and not ~~conceded~~ concealed.

The language of this court in *Owensboro* v. *Cumberland Telephone Co.,* 230 U. S., at p. 66, is recalled. The court there said:

> "If there be authority to make the grant and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the *public and permanent character of the business* such companies conduct and the large investment which is generally contemplated."

And this court there quoting from one whom it justly characterizes as a most weighty writer upon municipal corporations, said:

> "The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the

> rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import."

THE GRANT WAS NOT A PERSONAL GRANT TO THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY.

Our adversary says "the privilege was personal to the Trustees." (Brief, 41.) It is obvious that this is not so. The grant was to the Trustees of the Cincinnati Southern Railway "for the use of said railway." This was not a personal enterprise the Trustees had undertaken, nor was it dependent in any respect on their relation to it. We have pointed out that the Trustees had the legal title only. The City of Cincinnati was the true grantee. This subject has been fully discussed elsewhere in this brief.

We have also pointed out that the statutes of the State of Ohio, in force at the time this grant was made, provided for the leasing of the Cincinnati Southern Railway, all of which was known to the State of Georgia.

CONSIDERATION FOR THE GRANT IS SHOWN ON ITS FACE.

Our adversary argues that no consideration for the grant is expressed. But this is obviously an error. The grant recites that the City of Cincinnati had *nearly* completed the Cincinnati Southern Railway, a grand trunk line, "which will be of *great benefit* to the State of Georgia." The benefit there referred to is that of being an extension, of course in a business way, of the Western

& Atlantic Railroad, the state's property, and of giving to Georgia's commerce an "admirable connection with the railway system of the north and west."

Another recognized benefit and advantage consists in the two railroads having their tracks and works located "close together." That juxtaposition is recognized as one that would save expense to the Western & Atlantic Railroad in maintaining its roadbed and in facilitating railroad operation, and in giving to the Western & Atlantic the advantage of a stronger and firmer roadbed. What more valuable consideration than the foregoing could the State of Georgia receive?

We call attention to the recital that the City of Cincinnati "has *nearly completed* the Cincinnati Southern Railway." The significance of that is that it is a recognition that by this grant, and the work to be done under it, the railway would be entirely completed, thus making the grant an essential factor in the *complete,* not in the *temporary,* construction of the Cincinnati Southern Railway.

To the claim that the construction of the Cincinnati Southern Railway really afforded no protection to the Western & Atlantic roadbed, and to the further claim that the State of Georgia received no benefits from the construction of the Cincinnati Southern Railway, we have made full and sufficient answer in the earlier parts of this brief.

To the claim made by our adversary that the damage to the Western & Atlantic Railroad at the time of the grant of 1879 from floods of the Tennessee river had been so infrequent and inconsequential as not to call for any further protection, and that the damage from overflows from the Tennessee river would have been the same had the Cincinnati Southern Railway built on its own adjoining right-of-way, we say that the judgment of the Legislature of the State of Georgia, and of men living at that time cognizant of the facts, was of an entirely different sort, and that the testimony in this case shows that the judgment of the State of Georgia was sound.

COMPLAINANT'S CLAIM AS TO STATUTE OF LIMITATIONS.

Our adversary discusses his subject at pages 61 *et seq.* of his brief. He in no substantial way refutes any claim we make as to the statute of limitations being a protection to our railroad. As to what he denominates the "greater encroachment," by which he means that part of our right-of-way which lies *west* of the Western & Atlantic Railroad, he says there is no room for application of the statute of limitations because our occupancy of that part was by consent of the State of Georgia, both under his view of the effect of the grant and under ours. In this we agree with him. subject to three big exceptions: (a) If the grant was void *ab initio* under the Constitution of the State of Georgia, as our adversary claims is the case, we do rely on the statute of limitations as to that part of the right-of-way; (b) If, as is claimed by our adversary, the grant was personal to the Trustees of the Cincinnati Southern Railway, and was terminated by the lease of the Cincinnati Southern Railway to the Cincinnati, New Orleans & Texas Pacific Railway Company, which event occurred October 11, 1881, then the statute of limitations does apply; (c) If the legislative Act of October 8, 1879, gave only a revocable license, that license was revoked by operation of law when the lease of the Western & Atlantic Railroad was made by the State of Georgia to the Nashville, Chattanooga & St. Louis Railway July 19, 1890, effective December 27, 1890, for a term of twenty-nine years (Rec., 269) *if* it had not been revoked by the event mentioned in (b), and the statute of limitations would apply.

As to the application of the statute of limitations to what our adversary denominates the "lesser" strip, which is the 1,750 foot strip on the east side, we find that he gives occasion in his brief for no further remarks thereon than what we have heretofore submitted under the appropriate heading in this brief.

GEORGIA SOVEREIGNTY.

The attitude of our adversary towards this case is dominated to a large extent by the idea that Georgia is a sovereign in respect of the ownership of this road. He even speaks of the Tennessee Act of January 24, 1838 (Defendants' Answer, p. 6, Rec., 20), allowing Georgia the right-of-way for her railroad from the Georgia line to the Tennessee river, *as a Treaty*; and he talks of ambassadorial agencies and visitations between the State of Georgia and the State of Tennessee. But this exaggerated view does not fit the commonplace of this case. When the State of Tennessee passed the legislative act of 1838, allowing the right-of-way to the State of Georgia, it provided, in connection therewith, that the state should be entitled to "all privileges, rights and immunities (except the subscription on the part of Tennessee) and be subject to the *same restrictions* as far as they are applicable" that had been granted, made and prescribed for the benefit, government and direction of the Hiwassee Railroad Company. Georgia accepted this act by building her railroad in Tennessee, without which she could not have built it in that state. By this acceptance she became in Tennessee a chartered railroad corporation. She acquired in that character all the privileges, rights and immunities of a Tennessee corporation engaged in railroad ownership, and became subject to the same *restrictions prescribed* for the government of a railroad company engaged in the ownership and operation of a railroad, and, as before stated, she completely stripped herself—as far as respects that railroad, at least in Tennessee, of every attribute of sovereignty, and descended to the level of any other railroad corporation. To say, as our adversary does say, that the words "*as far as they are applicable*" eliminate liability to suit, liability to the operation of the statute of limitations, and liability to the doctrine of estoppel, is to speak without warrant. If you throw out those restrictions, which are the general and usual restrictions applicable to a corporation, you might as well throw out every other restriction and say that Georgia came into Tennessee with this railroad under no restriction whatever. The words "as far as they are applicable" were appropriate, because by referring to the Hiwassee act (Rec., 258) it will be seen that there were a number of provisions that would be inapplicable to the Georgia corporation, such, for example, as the limitation on capital stock, necessity for having capital stock, the provision for the officers of the corporation, stockholders' and officers' meetings, prescribing the duties of the officers, provisions for increasing the capital stock, and many other provisions not necessary to enumerate. The chartered name which by common repute, in Tennessee at least, the State of Georgia assumed with reference to this railroad in Tennessee was that of "the Western & Atlantic Railroad Company." By that name she was sued in the case of *West-*

ern & Atlantic Railroad Company v. *T. H. Taylor*, 6 Heiskell, p. 408. That was a suit on an obligation issued by the State of Georgia in respect of the Western & Atlantic Railroad and was brought and maintained against her by the name of the Western & Atlantic Railroad Company; and in that case the Supreme Court of Tennessee, in a very well reasoned opinion, said that the State of Georgia, in creating the Western & Atlantic Railroad, brought itself under the same obligations, restrictions and liabilities as other railroads in the state; that by giving it capacity to sue and be sued, the state had voluntarily stripped herself of sovereign capacity so far as respects the transactions of the road, and waived all privileges of that character. (See p. 415.)

And in the case heretofore referred to, of *East Tennessee, Virginia & Georgia Ry. Co.* v. *Nashville, Chattanooga & St. Louis Ry. Co. et al* (51 S. W. Rep., 202, at p. 210, right-hand column, at bottom), we find that the Supreme Court of Tennessee decided expressly that by virtue of the acceptance of the Act of 1848 (Defendants' Answer, p. 7, Rec., 21), the State of Georgia was suable in the State of Tennessee in respect of transactions growing out of its *ownership* of the Western & Atlantic in Tennessee.

We have also called attention to the decision of the Supreme Court of Georgia (*Morrison* v. *Cook*, 146 Ga., at p. 577) holding distinctly that Georgia's *ownership* of this railroad was a private enterprise and not a governmental function.

In view of these decisions, and of what would seem to be absolutely clear without these decisions, it is in vain that our adversary strives to get rid of them by the claim that the decisions were either wrong or that they pertained to matters of operation as contradistinguished from ownership.

Our adversary admits at page 89 of his brief "that, in so far as concerns transactions arising out of the operation of the road, the state voluntarily laid aside her sovereignty and consented to become subject to the rules and regulations governing common carriers." We insist that there is no ground for this distinction, and that this admission, whether intended to have that effect or not, extends to transactions arising out of ownership as well as to transactions arising out of operation. The two are not distinguishable.

Equities of the Parties.

Under this heading our adversary states that Georgia amply complies with the obligation to do equity by offering an extenison to the Trustees of the Cincinnati Southern Railway of a time allowance to build a new line from Boyce into Chattanooga. But she proposes to make no allowance whatever for the expense of creating such new line, and no allowance whatever for the appropriation she proposes to make of the work done, consisting of grading, building embankments, making cuts and building viaducts, and other benefits conferred upon the roadbed of the State of Georgia. It is shown in this case, by the testimony of complainant's engineer, Mr. J. H. Johnston, that the roadbed of the Cincinnati Southern Railway on the right-of-way granted October 8, 1879, "*is just a series of cuts and fills.*" The aggregate of such cuts and fills, he says, is 12,610 feet. To build a new line through the same territory would require presumably a like character of work; and from this alone the court can imagine the amount of the cost. And when we consider the obstacles presented by the four substantial concrete overhead viaducts, as shown in the testimony of Mr. Curtis Dougherty, the engineer for the corporate defendant, it is clear that there is no room under them for this track if it lose its present location. (Rec., 204.)

So that we conclude that this proffer of equity on the part of the State of Georgia is more shabby than generous, and does not meet requirements.

IRREPARABLE INJURY.

The State of Georgia makes claim that she is suffering irreparable injury by not having this 23½-foot strip. The answer to that is that she suffers nothing of the kind. On July 19, 1890, she leased the Western & Atlantic Railroad to the Nashville, Chattanooga & St. Louis Railway for a term of years expiring December 27, 1919 (Rec., 266), and there is no evidence of diminution of rental, in making that lease, by reason of this 23½-foot strip being in the occupancy of the Cincinnati Southern Railway. The Nashville, Chattanooga & St. Louis Railway, operating lessee, instead of needing this 23½ feet for the operation of the Western & Atlantic Railroad, executed a surrender of the same to the State of Georgia for the duration of that lease (Rec., 99); and the president of said lessee company (Mr. Peyton) testified that he executed that surrender without any understanding whatever that if the State of Georgia succeeded in recovering this 23½-foot strip it should pass under that lease (Rec., 102). And the state followed that lease with another lease made May 11, 1917, for a term that will not expire until Decembr 27, 1969 (Rec., 269). In this last lease she did reserve the right (clause 14, Rec., 275) "to remove and cause to be discontinued all encroachments and other adverse uses and occupancies in and upon the right-of-way or upon other properties of the Western & Atlantic Railroad, or any part thereof, whether maintained under claim of lawful right or otherwise; and to this end the party of the second part (lessee) hereby consents that the state may withhold delivery of possession, or right of possession to the party of the second part of such parts of the right-of-way and other properties as may be so adversely used and occupied, until such encroachments and other adverse uses and occupancies shall have been removed or discontinued." And then she added:

"It is understood and agreed that when such adverse uses and occupancies shall have been removed by judicial proceedings or otherwise the use of the same for the remaining period of the lease shall inure to the benefit of the party of the second part to the same extent as the other portions of the right-of-way and properties herein conveyed shall inure to it under the terms and provisions of this contract."

But there is no increase of rent or additional compensation to be made to the State of Georgia in case events turn out to be such that this 23½ feet will pass under that lease. So that it is not discernible wherein the State of Georgia suffers irreparable injury by not having this 23½ feet of right-of-way. But it does appear that this suit is prosecuted by the State of Georgia for the benefit of the Nashville, Chattanooga & St. Louis Railway, as lessee; and the question arises whether the

State of Georgia can be permitted to use its constitutional privilege of suing in this court for such purpose?

We ask that the bill be dismissed.

All of which is respectfully submitted.

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September 30, 1918.

APPENDIX.

ACT OF MAY 4, 1869, OF THE GENERAL ASSEMBLY OF THE STATE OF OHIO AUTHORIZING CONSTRUCTION OF THE CINCINNATI SOUTHERN RAILWAY. (66 Ohio Laws, p. 80.)

"AN ACT

"Relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio,* That whenever, in any city of the first class having a population exceeding one hundred and fifty thousand inhabitants, the city councl thereof shall, by a resolution passed by a majority of the members elected thereto, declare it to be essential to the interests of such city that a line of railway, to be named in said resolution, should be provided between termini designated therein, one of which shall be such city, it shall be lawful for a board of trustees, appointed as herein provided, and they are hereby authorized to borrow as a fund for that purpose, not to exceed the sum of ten millions of dollars, and to issue bonds therefor in the name of said city,under the corporate seal thereof, bearing interest at a rate not to exceed seven and three-tenths per centum per annum, payable at such times and places, and in such sums, as shall be deemed best by said board. Said bonds shall be signed by the president of said board, and attested by the city auditor, who shall keep a register of the same, and shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city, and a tax, which it shall be the duty of the council thereof annually to levy, sufficient, with said net income, to pay the interest and provide a sinking fund for the final redemption of said bonds; provided, that no money shall be borrowed on bonds issued until after the question of providing the line of railway specified in the resolution shall be submitted to a vote of the qualified electors of said city, at a specified election to be ordered by the city council thereof, of which not less than twenty days' notice shall be given in the daily papers of the city; and further provided, that a majority of said electors, voting at such election, shall decide in favor of said line of railway. The returns of said election shall be made to the city clerk, and be by him laid before the city council, who shall declare the result by a resolution. The bonds issued under the authority of this section shall not be sold or disposed of for less than their par value.

SEC. 2. If a majority of the votes cast at said election shall be in favor of providing the line of railway as specified in the first section, it shall be the duty of the solicitor forthwith to file a petition in the superior court of said city, or, if there be no superior court, then in the court of common pleas of the county in which said city is situate, praying that the judges thereof will appoint five trustees, to be called the trustees of —— railway, (the blank to be filled with the name given to the railway in the resolution); and it shall be the duty of said judges to make the appointment, and to enter the same on the minutes of the court. They shall enter nto bond to the city in such sum as the court may direct, with one or more sufficient sureties, to be appointed by the court, conditioned for the faithful discharge of their duties. The bond so taken shall be deposited with the treasurer of the corporation for safe keeping.

Sec. 3. The said trustees and their successors shall be the trustees of the said fund, and shall have the control and disbursement of the same. They shall expend said fund in procuring the right to construct, and in constructing a single or double track railway, with all the usual appendages, including a line of telegraph between the termini specified in the said resolution; and for the purpose aforesaid shall have power and capacity to make contracts, appoint, employ and pay officers and agents, and to acquire, hold and possess all the necessary real and personal property and franchises, either in this state or in any other state into which said line of railway may extend. They shall also have power to receive donations of land, money, bonds and other personal property, and to dispose of the same in aid of said fund.

Sec. 4. The said trustees shall form a board, and shall choose one of their number president, who shall also be the acting trustee, with such power as the board may by resolution from time to time confer upon him. A majority of said trustees shall constitute a quorum, and shall hold regular meetings for the transaction of business, at their office in the city under whose action they are appointed, but they may adjourn from time to time to meet at any time and place they may think proper. They shall keep a record of their proceedings, and they shall cause to be kept a full and accurate account of their receipts and disbursements, and make a report of the same to the city auditor annually, and whenever requested by a resolution of the city council. No money shall be drawn from said fund but upon the order of said board, except their own compensation, which shall be paid out of the same upon the allowance of the court appointing them, and shall be proportioned according to their respective services.

SEC. 5. Said trustees shall have power to take such security from any officer, agent or contractor, chosen, appointed or employed by them, as they shall deem advisable. They shall not become surety for any such officer, agent or contractor, or be interested directly or indirectly in any contract concerning said railway. They shall be responisible only for their own acts.

SEC. 6. Whenever the city solicitor of any city under whose action a board of trustees has been appointed as herein provided, shall have reason to believe that any one of said trustees has failed in the faithful performance of his trust, it shall be his duty to apply to the court that appointed said trustee, by petition, praying that such trustee be removed, and another appointed in his place; and when a vacancy shall occur in said board from any other cause, it shall be filled in like manner. If the said city solicitor shall fail to make application in either of the foregoing cases, after request of any holder of the bonds issued by said trustees or by a tax-payer of the corporation, such bond-holder or tax-payer may file a petition in his own name on behalf of the holders of such bonds for like relief, in any court having jurisdiction, and if the court hearing the action shall adjudge in favor of the plaintiff, he shall be allowed as part of his costs, a reasonable compensation to his attorney.

SEC. 7. Whenever in the construction of a line of railway as herein provided, it shall be necessary to appropriate land for the foundation of the abutments or piers of any bridge across any stream within or bordering upon this state, or for any other purpose, or to appropriate any rights or franchises, proceedings shall be commenced and conducted in accordance with the act entitled 'an act to provide for compensation to the owners of private property appropriated to the use of corporations,' passed

April 3, 1852, and the acts supplementary thereto, except that the oath and verdict of the jury and the judgment of the court shall be so varied as to suit the case.

Sec. 8. Whenever there shall be between the termini designated in any resolution passed under this act, a railroad already partially constructed, or rights of way acquired therefor, which can be adopted as part of the line provided for in said resolution, the trustees of said line may purchase the said railroad and right of way, and pay for the same out of the trust fund.

Sec. 9. The said trustees shall have power, as fast as portions of the line for which they are trustees are completed, to rent or lease the right to use and operate such portions upon such terms as they may deem best; but such rights shall cease and determine on the final completion of the whole line, when the right to use and operate the same shall be leased by them to such person or company as will conform to the terms and conditions which shall be fixed and provided by the council of the city by which the line of railroad is owned.

Sec. 10. The city council of any city passing a resolution as provided in the first section, may appropriate and pay to the said trustees, out of the general fund of said city, such sum as may be necessary for defraying the expenses of the election, and said sum shall be repaid out of said trust fund when raised.

Sec. 11. This act shall take effect on its passage.

F. W. Thornhill,
Speaker of the House of Representatives.
J. C. Lee,
President of the Senate."

"Passed May 4, 1869."

A summary of the enabling Act of Tennessee and of the enabling Act of Kentucky will be found at pp. 233 and 234 of the Printed Record.

Note.—Although Section 9 of the above quoted act was repealed April 18, 1878 (75 Ohio Laws, 115), yet previous to that repeal power to lease the whole line had been given by another act passed April 18, 1873 (70 Ohio Laws, 140); and in the repealing act itself power was given the Trustees to rent or lease temporarily as fast as portions of the line were completed. (See p. 49 of the brief).

OCT 31 1918
JAMES D. MAHER,
CLERK.

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Supreme Court of the United States

OCTOBER TERM, 1918.

THE STATE OF GEORGIA,
Complainant,

No. 21 Original. *vs.*

THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY and THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
Defendants.

Addendum to Brief for Defendants.

Since our printed brief was filed in this case the following authorities which we desire to bring to the attention of the court have come to our notice:

ALLEGED SOVEREIGNTY OF GEORGIA AS RESPECTS THE WESTERN AND ATLANTIC RAILROAD.

In a publication entitled "The Code of the State of Georgia" (1882) by Lester, Rowell & Hill, we find:

> §964. "The State occupies the same relation to said road" (Western & Atlantic), "as owner, that any company or incorporation does to its railroad, and the obligations of the State to the public concerning said road, and of the public to said road, are the same as govern the other railroads of this State, so far as is consistent with the sovereign attributes of this State and the laws of force for its conduct."
>
> §974. "All suits against the road must be brought against the Superintendent in his official capacity, in the County of Fulton, where the office of said road is located, except in those cases of claims where, by the law other railroads are allowed to be sued elsewhere, but under no circumstances are suits against such road to be allowed against such road, its officers or agents, in the State of Tennessee *beyond the right, if any, that may exist under the authority granted to this State to extend said road into Tennessee.*" [Italics ours.]

As further showing that Georgia in her capacity as owner of this railroad is not a sovereign, we quote the following from the case of *Scofield Rolling Mill Co.* v. *State of Georgia,* 54 Ga., at p. 642:

> "* * * But in a case of this sort, when the state descends from her throne of sovereignty where, like a King, she can do no wrong and becomes to all intents and purposes a railroad company, and when, moreover, she enters her own courts and sues one of her citizens, or an artificial person, the creature of her breath, her railroad agents, as to matters in litigation connected with the business of the road, are

like other agents, and in respect to their conduct, she is bound like other principals."

Respectfully submitted,
EDWARD COLSTON,
MICHAEL M. ALLISON,
Solicitors for The Cincinnati, New Orleans & Texas Pacific Railway Company.
WASHINGTON T. PORTER,
JOHN WELD PECK,
HENRY T. HUNT,
Solicitors for Trustees of Cincinnati Southern Railway.

October 28, 1918.

STATE OF GEORGIA *v.* THE TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY AND THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

IN EQUITY.

No. 21 Original. Argued November 7, 1918.—Decided November 18, 1918.

In the absence of language suggesting a different intention, a grant of the use of a railroad right of way must be taken as granting the right of way itself. So *held*, where the purpose was to supply a roadbed for a trunk line, necessitating expenditure by the grantee. P. 28.

A grant of a railroad right of way to a corporation, or to perpetual trustees holding for corporate uses, does not need words of succession to be perpetual. *Ib.*

A grant of right of way for a railway from which great public benefit is expected *held* not a gratuity within the provision of the Georgia constitution forbidding the general assembly to grant any donation or gratuity in favor of any person, corporation, or association. P. 29.

By the Act of October 8, 1879, the State of Georgia granted a perpetual right of way for the Cincinnati Southern Railway, not a revocable license.

Bill dismissed.

THE case is stated in the opinion.

Mr. William A. Wimbish for complainant.

Mr. Edward Colston, with whom *Mr. Michael M. Allison, Mr. Washington T. Porter, Mr. John Weld Peck* and *Mr. Henry T. Hunt* were on the briefs, for defendants.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought in this Court by the State of Georgia to prevent the defendants from longer occupying or using any portion of the right of way of the Western and Atlantic Railroad, a railroad built and owned by the plaintiff State. The question, although argued at considerable length, is a very short one. On October 8, 1879, the State passed an act sufficiently explained by its contents.[1] On August 21, 1916, reciting that the Cincinnati

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[1] An Act granting right-of-way to the Cincinnati Southern Railway, where its route adjoins that of the Western and Atlantic Railroad.

Section I. *Be it enacted by the General Assembly of the State of Georgia*, That whereas the city of Cincinnati has nearly completed the Cincinnati Southern Railway, a grand trunk line which will be of great benefit to the State of Georgia, forming a most important feeder and, practically, an extension of the Western and Atlantic Railroad, which is the property of the State, and giving to our commerce the advantage of a direct and admirable connection with the railway system of the North and West;

And whereas, said railway reaches the Western and Atlantic Railroad at Boyce's Station, and for the most of the distance to the termini of the two railroads in Chattanooga, their routes run parallel to and adjoining each other, a distance of about five miles;

And whereas, it is to the advantage of both railroads to be able to locate their tracks and works close together, thus saving expense to one in construction, and to both in maintaining the road-bed and facilitating railroad operations; and giving to both railroads the advantage of a stronger and firmer road-bed through a route subject to overflow by floods in the Tennessee river; there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway, the use of that portion of the right-of-way of the Western and Atlantic Railroad between Boyce's Station, Tennessee, and the Chattanooga, Tennessee, terminus that lies westerly of a line running parallel with, and nine and a half feet westerly from the center of the track of the Western and Atlantic Railroad, so as to admit of laying track, if desired, near enough to the track of the Western and Atlantic Railroad to leave the distance between the centers of tracks fourteen feet, and between the nearest rails of the two railroads nine feet; *Provided always*, that this grant is subject to the consent and approval of the lessees of the Western and Atlantic Railroad as to the term of their lease; *Provided further*, that the grade adopted by the said Cincinnati Southern Railroad [*sic*] along and over the aforegranted right-of-way shall always be the same as that of the Western and Atlantic Railroad.

Sec. II. *Be it further enacted*, That all Acts and parts of Acts inconsistent with this Act are hereby repealed. [Laws 1879, No. 234].

Southern Railway now is controlled by a competitor of the Western and Atlantic road and that the Western and Atlantic needs the space, Georgia undertook to repeal the former act and to treat it as giving a license only, that the State was free to revoke. [Laws 1916, No. 539.] The defendants say that the words "there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway the use of that portion of the right-of-way of the Western and Atlantic Railroad" &c. grant a right of way in fee.

The Ohio statute under which the Cincinnati Southern Railway was constructed by the City of Cincinnati provided for a board of trustees to be appointed and kept filled by the Superior Court of the city, to have control of the fund raised by the city, and to acquire and hold all the necessary real and personal property and franchises either in Ohio or in any other State into which the line of railroad should extend. Therefore the grant to the trustees was the proper form for a grant in effect to the Railway, as it was styled in the title of the Georgia act, or to the city if the city was in strictness the *cestui que trust.* No other facts of much importance appear. Considerations are urged on behalf of Georgia to show that the motives for a perpetual grant were weak, but nothing that affects the construction of the words used or that shows that they are not to be given their ordinary meaning, as indeed the argument for the plaintiff agrees. But if that be true, *cadit quaestio.* A grant of the use of a right of way is the grant of a right of way in the ordinary meaning of words, and a grant of a right of way to a corporation or to perpetual trustees holding for the corporate uses does not need words of succession to be perpetual. The words "and its successors" or "in fee" would not enlarge the content of a grant to a corporation. *Owensboro* v. *Cumberland Telephone & Telegraph Co.,* 230 U. S. 58 66. *Detroit* v. *Detroit Citizens' Street Ry. Co.,* 184 U. S. 368, 395.

Great Northern Ry. Co. v. *Manchester, Sheffield, & Lincolnshire Ry. Co.*, 5 DeG. & Sm. 138, 146. If a grantor wishes to limit the effect of words sufficient on their face to convey a fee it should express the limitation in the instrument. The purpose of the grant in this case, to supply a roadbed for a trunk line, necessitating considerable expenditure on the part of the grantee, confirms, if confirmation were required, the legal effect of the words unexplained. *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U. S. 649, 663. *Llanelly Ry. & Dock Co.* v. *London & Northwestern Ry. Co.*, L. R., 8 Ch. 942, 950. *Great Northern Ry. Co.* v. *Manchester, Sheffield, & Lincolnshire Ry. Co.*, 5 DeG. & Sm. 138.

We think it unnecessary to refer to the language in detail beyond saying that there is nothing in the statute to suggest an intent to limit the scope of the grant and that such expressions as "*Provided further*, that the grade adopted by the said Cincinnati Southern Railroad along and over the aforegranted right-of-way shall always be the same as that of the Western and Atlantic Railroad," further confirm our interpretation, as does also the requirement of the consent of the lessees "as to the term of their lease," since those words imply that that grant is of something more that does not require their assent. Elaborate discussion of the circumstances seems to us superfluous. But it is necessary to mention the objection that by the constitution of Georgia the general assembly was forbidden to "grant any donation or gratuity in favor of any person, corporation, or association," and that there was no consideration for this grant. Even if the contemplated and invited change of position on the part of the Cincinnati Southern Railway and the benefit to the State expressly contemplated as ensuing from it were not the conventional inducement of the grant, and so, were not technically a consideration, we are of the opinion that the grant was not a gratuity within the meaning of the state constitution. A conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the constitution intended to prevent and in our opinion is not within the meaning of the word as it naturally would be understood. We deem further argument unnecessary to establish that the State of Georgia made a grant which it cannot now revoke.

Bill dismissed.